United States Court of Appeals

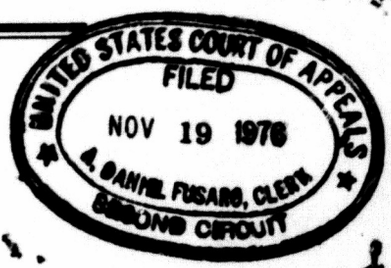
for the Second Circuit

JOINT APPENDIX

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76-7454-7480



United States Court of Appeals
FOR THE SECOND CIRCUIT

BIG SEVEN MUSIC CORP. and ADAM VIII, LTD.,
Plaintiffs-Appellants,

against

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC. and EMI RECORDS LIMITED,
Defendants-Appellees,

and

MORRIS LEVY,
Additional Defendant on Counterclaim-Appellant.

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NEMEROFF, JELLINE, DANZIG, PALEY, MANDEL AND BLOCH
Attorneys for Additional Defendant on Counterclaim-Appellant Morris Levy
350 Fifth Avenue
New York, New York 10001
(212) 947-[illegible]760

MARSHALL BRATTER GREENE ALLISON & TUCKER, Esqs.
Attorneys for Defendants-Appellees John Lennon and Harold Seider
430 Park Avenue
New York, New York 10022
(212) 421-7200

WALTER, CONSTON, SCHURTMAN & GUMPEL, P.C.
Attorneys for Plaintiffs-Appellants Big Seven Music Corp. and Adam VIII, Ltd.
280 Park Avenue
New York, New York 10017
(212) 682-2323

CLEARY, GOTTLIEB, STEEN & HAMILTON
Attorneys for Defendant-Appellee Apple Records, Inc.
One State Street Plaza
New York, New York 10004
(212) 344-0600

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THE COURT: You can put in all kinds of hypotheses, and I could in considering this question of damages, crank in a very elaborate TV campaign, and if I did, then I might wonder, well, if you spend another quarter of a million dollars on TV I would assume that Capitol has some idea what it is going to do and that it would not be just money down the drain. I guess I would begin to assume that that might produce very large sales, and you have in your consideration at page 51 of the brief talked in terms of the three-quarters of a million units, and I am telling you if you are going to talk about a quarter of a million dollars in TV, then you would have to assume they had good reason to believe that it was worthwhile investment for getting that range of sales, that you would not spend another quarter of a million dollars to get an additional 50,000 records sold.

My approach on damages, I tell you, is that there is a limitation on the amount of hypothesis I am going to crank in here. I am not assuming a million sales or 750,000 worth of sales, because to me that is based on a lot of assumptions which I cannot entertain. And, by the same token, I don't think that I can assume a lot of very large expenditures which were not made and

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which would have been completely unjustified to arrive at 450 or 475 in sales.

MR. PRETTYMAN: If they will give us credit for the 750,000 in sales that they seem to be saying we would have gotten if we had been able to spend this money, we would be happy to deduct the cost.

MR. SCHURTMAN: I am not asking you for 250,000; I am not asking you to deduct 150,000; I have simply pro-rated the amount and I am simply suggesting to you if you are going to find sales were going higher than they did, that they would have gone as high as Walls and Bridges or Mind Games, or higher than that, I think you got to assume it would have taken some additional promotion to cause that, and that is a variable cost. That is my only point on that.

THE COURT: I have to ask you to conclude very quickly.

MR. SCHURTMAN: Now let me just cover a few of my key points.

On the mitigation of damages, your Honor, we have briefed the point very carefully. There is a definite duty to mitigate damages, and the mitigation of damages could have occurred quickly. I don't think they had to cut their price at all on the album that came out

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five days after the Roots TV ads had appeared on the air at $4.98. Right there they could have mitigated damages, and they would not have had to cut their price, even if you assume they didn't know it before then. They could certainly have increased the promotion once they saw that the album was doing well on the charts, that it had gone up to No. 4 and No. 6. They could have put in some additional promotional input in order to carry on this momentum, if that is what it really takes to carry momentum. They didn't do that.

Your Honor observed that Mr. Seider and Mr. Lennon and their lawyers certainly knew as far back as January 9 or January 13 that Levy intended to put out this album. They concealed this information, at least, Mr. Seider and the Marshall, Bratter attorneys did, they concealed the information from Capitol until February 1st.

Mr. Menon and Mr. Woods of EMI refused to talk to Mr. Levy; Mr. Coury set up a date to talk to Mr. Levy, and then Mr. Menon told him not to go. All these factors bear on mitigation of damages. But the key factor on the mitigation of damages that I want you to keep in mind is that they exercised a certain business judgment, be it to cut the price, be it to rush out the

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album, instead of waiting to see if they could get Roots off the air, as they did after sending the telegrams -- these were all business judgments. If the business judgments were the necessary, immediate and direct result of what we did, fine, then you have established a causal connection. But if they were simply business judgments, and they may have been good faith business judgments that proved to be wrong, then under the rule of mitigation of damages laid down by the Second Circuit, we are simply not responsible for those business judgments. We may have sinned, but our sins did not cause their damages.

Now, one last word on punitive damages, if your Honor is entertaining the thought of punitive damages. The law in New York is very clear. To get punitive damages, and this applies to Section 51 of the Civil Rights law, as well as general punitive damages, you have to show more than an intentional tort, you have to show two things:

You have to show conduct tantamount to criminality and you have to show general injury to the public at large, and not only to the particular plaintiff. The New York Court of Appeals has so held; other courts have so held. I submit that neither of these elements has been shown in this case, certainly, not injury to the

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public. And as to conduct amounting to criminality, tantamount to criminality, your Honor in your first opinion found that Mr. Lennon went around telling people he was making an album for Levy, which, incidentally, implies a finding that you thought Mr. Lennon was lying when he said he had not told these different people so. Your finding was to the contrary.

Now, Mr. Levy had reason to believe that he had a deal with Lennon. Your Honor has found that he was mistaken, that he should not have so believed he had a deal with Lennon, because you did not have all the enforceable elements of a contract. Okay. He was mistaken. It was a very costly mistake, a bad mistake. It was costly to Mr. Levy, costly to all the parties here. But there is nothing here that is tantamount to criminality, not the sort of thing where you would award punitive damages. You award compensatory damages provided they have proved compensatory damages, and if they have not proved it, then they get the traditional 6 cents. It is what in law school we call damnum absque injuria. They simply have not proved any dollars and cents damages, because they have not proved a causal connection. And that, your Honor, I submit is what has happened in this case. And I implore, your Honor, I have worked day and

night to pull together all of these record references, even if Mr. Prettyman claims I distorted the record, I did my best, I pulled together every record reference I could think of that bears on this point. I have pulled together the exhibits, I worked till four o'clock this morning getting the brief into final shape -- at least your Honor will take a look at it. That is all. That is my request to you.

THE COURT: Mr. Schurtman, I can assure you that I am quite familiar with the record. I have pored over the record quite a bit. I appreciate your brief. I think it has been helpful in focusing on points as we go along. But I want to put my decision on the record here and now because I feel I am best able to do it now, rather than wait.

The following statement constitutes my findings of fact and conclusions of law:

This statement deals with counterclaims asserted by defendants Capitol Records, Inc., EMI Records, Ltd., and John Lennon. There are two other defendants -- Harold Seider and Apple Records, Inc. However, Seider asserts no counterclaims. As to Apple Records, this defendant originally asserted counterclaims, but now states that it has no independent claims for damages separate and apart from those of other defendants. Apple will

pursue these matters solely by way of agreement with the other defendants.

The counterclaims are asserted against plaintiffs Big Seven Music Corp. and Adam VIII, Ltd. Morris Levy, the principal of the two plaintiff corporations, is also the subject of the counterclaims, and has been enjoined as an "Additional Defendant on Counterclaim."

The counterclaim arises out of the fact that Levy, through Adam VIII, advertised and issued the Roots album containing Lennon's recording of rock and roll songs. This album was put out in competition with Capitol's own album containing substantially the same songs -- entitled Rock and Roll.

Capitol claims that its sales of the Rock and Roll album and its sales of subsequent John Lennon albums were reduced, and will be reduced, as a result of the issuance of the Roots album. Capitol claims that it was forced to reduce the price of the Rock and Roll album, thus reducing its profits on the sales that were made. EMI claims that it suffered a reduction of the "pressing fees" it was to receive on the Rock and Roll album and would receive on further albums of John Lennon.

Lennon contends loss of royalties, by virtue of the reduced sales of his albums with Capitol.

All of the above claims are asserted under Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a), and under theories of common law copyright, misappropriation of property interest, and unfair competition. The Lanham Act claim, for false designation of origin, arises from the fact that the Roots album indicates that it is authorized by Lennon and Apple. With regard to the common law claims, Capitol and EMI contend that they had contractual rights with respect to Lennon recordings which were interfered with by Levy. Lennon asserts, of course, that he had rights to his own music which were interfered with by Levy.

Lennon also asserts a claim under Section 51 of the New York Civil Rights Law, asserting that his name and likeness were used in the Roots album and the related advertising without Lennon's permission.

Punitive damages are claimed.

There are claims for injunction and accounting of profits.

Finally Capitol and EMI initially made a claim for alleged interference with advantageous contractual relationships. The claim was that their relationships with Lennon have been harmed. This claim merits no discussion. For reasons stated by me earlier in the record, the claim

has no substance. I do not understand it to be pressed any longer.

The following are my findings with respect to these various claims.

The basic finding has already been made by me in my February 20, 1976 decision denying plaintiffs' claim for breach of contract and other relief against the defendants. I held that neither the plaintiffs nor Levy had obtained any right whatever in John Lennon's recording of the rock and roll songs which became the basis for the issuance by Levy and Adam VIII of the album Roots.

In other words, the effect of my holding was that Levy and Adam VIII had absolutely no right to issue Roots or to advertise it.

I have no doubt that this action of Levy and Adam VIII in issuing and advertising the Roots album violated the common law property rights of defendants Capitol, EMI and Lennon. I also have no doubt that the issuance of the Roots album, with its indication of authorization by Lennon and Apple, violated Section 43(a) of the Lanham Act. There was also unfair competition.

A brief chronology of the events beyond what I gave in my earlier decision is perhaps necessary.

On January 28, 1975, there was a conference in

New York City at which a general marketing program was decided upon between the Capitol executives and John Lennon with respect to the issuance and marketing of the Rock and Roll album by Capitol. As of this time the Capitol executives were apparently oblivious of any claim by Levy that he had a contractual right to issue an album of his own based upon Lennon's rock and roll recordings.

However, at least by January 30th, Levy had been told by Seider that there would be no consent by Capitol for his Rock and Roll album. That night the Capitol people learned that Levy intended to issue his album.

In the days that followed there were frantic efforts by both sides to take various steps. Both sides rushed to put out their respective albums. Capitol and its lawyers, and Lennon's lawyers, made a hurried attempt to investigate the situation and determine what events had occurred leading to the present controversy and to determine what legal rights were possessed by whom.

Although one might, at least in hindsight, think that Capitol would have done well to bring an action and obtain a temporary restraining order and a preliminary injunction, or at least to attempt to obtain these forms of relief, Capitol asserts now that it was occupied in pulling together the facts, it was not certain enough of

its rights, and for these reasons did not come to court.

In any event, around February 6th, Capitol received notice of Levy's placement of TV ads.

On February 7th, Capitol sent a telegram to Levy demanding that he desist. Levy did not do so and mounted a television advertising campaign for the Roots album which lasted from February 8th to February 17th.

During this time, Capitol decided to do [illegible] things. It decided to release its own album which was released about February 13th. It also decided to send telegrams to Levy's suppliers and his TV advertising outlets, demanding that these people stop their activities because such activities were in violation of Capitol's rights.

These activities of Capitol were successful and brought a halt to Levy's campaign after he had only sold about 1,270 of his albums.

Another decision of Capitol was with respect to the price of its own Rock and Roll album. The evidence is that Capitol's regular suggested retail price for a record album of this kind was $6.98, and $7.98 for the tape.

The evidence is, and I find, that Capitol reduced the suggested retail price for the record album to $5.98 and for the tape to $6.98 because of a belief that it needed to meet Levy's record album price, which was to

be $4.98.

Counsel for plaintiffs and for Levy strenuously argue that this price reduction was unnecessary and also virtually meaningless in view of the fact that these prices are theoretical prices only in that the retail market actually involves very substantial discounts and seldom involves sales at these suggested retail prices.

I have carefully considered all of this evidence and the arguments of plaintiffs and of Levy, and I find against them on this point.

I am convinced that there was no reason whatever for a reduction of the suggested retail price for the album from $6.98 to $5.98 and a comparable reduction for the tape, except the reasonable belief that this was necessary to compete with Levy's $4.98 album. I have considered the evidence about the discounts in the regular retail market and the lack of discounts in Levy's TV mail order market. However, judging Capitol's actions from the standpoint of the time in which these actions were taken I must conclude that a record company such as Capitol would be justifiably concerned about maintaining a $6.98 suggested retail price in the face of Levy's $4.98 price. Capitol's action in the face of this competition was reasonable and necessary.

A further decision of Capitol at this time was to rush its Rock and Roll album out far in advance of the time originally contemplated for its issuance. The evidence is clear that Capitol in normal counrse would have waited until March or April to market this album.

It is further clear that this would have given Capitol time to develop its promotional and advertising campaign to a more sophisticated, refined and higher quality campaign. It would have also permitted Capitol to have a more appropriate interval between the album previously issued by Capitol of John Lennon's music. In other words, the evidence is clear that issuance of the Rock and Roll album in mid-February of 1975 was indeed a rushing of the album and was disadvantageous to Capitol in the respects that relate to the proper marketing of that album.

The result was that Capitol issued the album with a cover which was not of the quality that was originally desired. An ingenious and imaginative plan for a TV commercial was in large part scrapped. Capitol's commercial was hastily developed and put together. Certain of the promotional items, such as T-shirts, buttons, and so forth, were not available to be distributed until later than they should have been.

A mobile which was originally planned was not

produced at all. Radio interviews of John Lennon which were normally used were not carried out because of lack of time.

All in all, there is simply no doubt that the timing of the release of Rock and Roll and the promotional and advertising program was substandard and disadvantageous to Capitol.

There are two basic and serious questions to be resolved in determining what damages, if any, are to be awarded because of these circumstances. The first question is whether the decision to rush the album was indeed a direct and necessary result of Levy's issuance of the Roots album.

Levy contends that Capitol made its own decisions based upon its own ideas of strategy; that these were improvident decisions and not really the direct and necessary cause of anything that Levy did.

I am compelled to find against Levy on this point and to find in favor of Capitol. Basically, it seems to me that Capitol was presented with something on the order of an emergency. A competing album was going out with John Lennon's rock and roll music. The ability of Capitol to stop this album, whether through court action or through other means of self-help, was uncertain. If Capitol had simply ignored the situation, followed its normal procedures for issuing the album and waited two months, Capitol might

well have ended up with a far greater loss of sales than occurred. It Capitol had then sued Levy claiming damages for such a situation, Levy undoubtedly would have said, and perhaps with some reason, that Capitol did not take reasonable steps to protect itself and did not act with the promptness and expedition that it should have.

In other words, the main point is that in my view Capitol acted reasonably under the circumstances known to it at the time and facing it at the time, and I cannot reject Capitol's claims on the basis of hindsight and second guesses applied long after the fact.

The other basic question is what damages did Capitol in fact suffer. This is a complicated and difficult question. We do not know what the sales of Rock and Roll would have been if it had not been for the action of Levy in issuing the competing album. There are many other factors, besides the presence of a competing album or the timing and quality of a promotional campaign, which may have an effect upon the sale of a popular music album such as Rock and Roll.

There has been the most extensive and searching evidence presented at the trial regarding all the various factors which the parties have wished to have considered in connection with this problem, but I start with one salient statistic. The album preceding Rock and Roll,

namely, the Walls and Bridges album, had sales of 425,000 units. The album issued after Rock and Roll named Shaved Fish has had sales of 408,000 units. Rock and Roll has had sales of 342,000 units.

I have considered the fact that Rock and Roll is not an album of John Lennon's own music. I have considered the fact that the Rock and Roll album obtained some highly critical and unfavorable reviews. I have considered the fact that in fiscal 1975 Capitol's sales were down some 15 or 20 percent or perhaps more because of an economic recession. But I must conclude on balance that the presence of the competing Roots album, the fact that Roots was advertised on television over a period of several days, the fact that Capitol's timing and promotional campaign was carried out under disadvantageous and rushed conditions, I think that it would be ignoring reality to believe that these untoward circumstances did not have an effect upon the sales of Rock and Roll.

The quality of the album in comparison with Lennon's other albums, the evidence about public reception aside from the unfavorable critical reviews, simply does not permit a conclusion that the Rock and Roll album would have taken a large dip in sales had it not been for the untoward marketing conditions.

One factor that I think is of some considerable interest is the evidence that in Canada sales of the Rock and Roll album were quite successful, and Canada did not experience the confusion of having Morris Levy's Roots album advertised on the Canadian televison stations.

I don't consider the Canadian experience and statistics as conclusive, but I think they are of considerable interest and indicative, and they would indicate that sales in the United States would have been over 500,000 units if one were to project the Canadian sales on a statistical basis into the United States.

All in all, I am convinced that the untoward circumstances caused by Levy's release of the Roots album had a substantial effect upon the sales of Rock and Roll. I make no pretense of being able to arrive at an assessment of the exact effect of Roots with anything like laboratory precision, but I think it is feasible to arrive at a reasonable estimate.

My benchmarks on such estimation are as follows: I believe that the low side is the figure for Walls and Bridges of 425,000. I believe that the high side is the 520,000 based upon the projection from the Canadian sales.

Considering all the circumstances, I find that a loss of sales of 100,000 units is a valid and sensible

estimate. In other words, I am finding that the sales can be estimated to have been approximately 440,000 had it not been for the problems with the Levy album.

This is the crucial finding, and permits a reasonable estimate of lost profits suffered by Capitol. Capitol has presented information based upon valid accounting that Capitol's net profit on an additional 100,000 units would be $1.47 per unit, or a total of $147,000, less $25,000 in additional merchandising costs, or a net of $122,000.

In this respect I agree with Capitol that it is not required to spread fixed costs over these additional albums. Also, I have in mind a point which was raised by Levy's counsel to the effect that Capitol had planned a very major television campaign involving initial $150,000 and possibly a further $100,000, and that Capitol did not put on any part of this campaign. Levy's counsel argues that any lost profits based on assumed additional sales must take into account the idea that such additional sales would have been based upon an additional television campaign which would have been costly in the way that I have just stated.

The trouble with this argument is that it injects a hypothesis which takes us into a realm of unreality.

We can project all kinds of figures about would-be sales and would-be profits based on all kinds assumptions about advertising, and so forth. If we assume a quarter of a million dollars advertising campaign, under the evidence we would almost necessarily have to assume vastly increased sales over and above what I have projected in my estimates.

In calculating damages and in making my estimates I believe that I cannot indulge in extravagant projections of either sales, profits or costs, and I adhere to the estimates which I have made.

With respect to lost profits because of the reduction of the suggested retail price from $6.98 to $5.98, Capitol had provided a valid accounting which shows that the net result of this price reduction on Capitol's profits was $105,000, and I accept this figure and find that such damages were suffered.

MR. SCHURTMAN: May I ask one question? Is that based on non-domestic sales and it is my understanding that no claim was made for foreign sales.

MR. PRETTYMAN: Could we have that read back? We didn't hear what he said.

THE COURT: Why don't you wait. You make your points at the end. I am basing this on the 342,000 units

sold, 65,000 Canadian units, and 30,000 foreign units, totaling 437,000 units. There is evidence with respect to such sales actually made and there is evidence that Capitol's net profit loss because of the reduced price was 24 cents per unit based on valid accounting methods. This takes into account the fact that Capitol's average price per unit to its customers, as distinct from suggested retail price, was reduced from $3.54 per unit to $3.06 per unit, with a corresponding reduction in net profit from $1.47 to $1.23, or a difference of 24 per unit.

I reject Capitol's claim to damages for actual or projected losses of sales in albums subsequent to Rock and Roll. This claim is too speculative for any monetary award.

To summarize, I am awarding Capitol a total of $227,000 in compensatory damages consisting of the $122,000 and the $105,000 figures that I have already mentioned.

With respect to EMI, the only damages proved relate to amounts per unit paid to EMI called pressing fees. The pressing fee is based upon the suggested retail price per unit. Again by means of a valid accounting treatment it has been shown that the reduction from $6.98 to $5.98 caused a reduction in the per unit pressing fee from twelve and a half cents to 9.1 cents, or a difference of 3.4 cents.

Applying this amount to the 437,000 units referred to gives a total of $15,000. If we apply the twelve and a half cent total pressing fee per unit to the 100,000 additional units which I have found would have been sold except for the Levy activity we have an additional $12,500. The total damages awarded to EMI is $27,500 compensatory damages.

This leaves, as far as compensatory damages, the claim of John Lennon. The evidence is that Lennon was entitled to a royalty of 68 cents per unit for the discs and 64 cents per unit for the tapes. Although the evidence is not clear as to the proportion of tapes and discs sold I think that undoubtedly the preponderance of the sales goes to discs. However, I will strike an average between the two and find that there is an average royalty here put unit of 66 cents.

Based upon my finding that 100,000 additional units would have been sold, this means that Lennon would have earned 100,000 times 66 cents or $66,000 based on the lost sales.

As far as the dollar reduction in the suggested retail price, this also produced a loss of royalties to Lennon which equals 10 cents per unit. Based on the 437,000 figure which I have dealt with earlier, this produces damages of

$43,700.

John Lennon is awarded damages for lost royalties totaling $109,700.

We come to the question of punitive or exemplary damages.

In my view, the issuance of the Roots album by Levy did constitute a wilful act in conscious and wilful derogation of the rights of Capitol, EMI and Lennon.

Levy knew that Lennon and Apple had contractual responsibilities to EMI and Capitol. Levy never bothered to ask to see a contract, never instructed his lawyers to look at contracts.

Levy claims to have relied on materials such as quotes in Playboy Magazine and opinions offered by Alan Klein, the former manager of the Beatles, as to his asserted right to distribute a Lennon album. But this was a complete and reckless disregard of the rights of Capitol, EMI and Lennon.

Levy had absolutely no basis for believing that he had the legal ability to issue this album, and I cannot in all realism believe that he even thought that he had such right.

(Continued on next page)

I believe that this case is one which comes within the standard where punitive damages are appropriate. I am referring now to the common law claims and to the claim under Section 51 of the Civil Rights Law made by Lennon.

However, I have in mind that the amounts of compensatory damages are heavy. Consequently the amounts of punitive damages will be moderate.

I am levying $10,000 in punitive damages in favor of each of the parties Capitol, EMI and Lennon.

With respect to attorneys' fees, I have concluded that these fees are not properly to be awarded in a non-trademark claim under Section 43 of the Lanham Act. The section, 15 U.S.C. Section 1117, which allows the award of attorneys' fees in "exceptional cases" makes reference only to trademark cases. Similarly the legislative history refers only to awarding attorneys' fees where there has been a violation of trademark law. In this case, there is no such violation and I hold that no attorneys' fees are recoverable.

As far as the common law damages, and the Section 51 claim, I have in mind the firm policy of our jurisprudence that in the normal litigation each party bears its own legal costs, and I find no valid basis for

treating this as anything approaching an extraordinary case which would cause me to depart from that rule.

I have in mind a few circumstances which I will state, although I would not attempt to be exhaustive. I have in mind that although the defendants have won this action, the fact that there has been a lawsuit, the fact that the parties have needed to come to court, is not entirely the fault of Levy. The dealings with Levy and his claims to be entitled to issue his Roots album were concealed from Capitol and from EMI by Seider long after they should have been revealed by him to these parties. If Seider had not diseembled in the way he did the problems that have arisen might have been solved quicker with either simpler or no litigation.

This does not excuse Levy for acting in the way he did, but in the consideration regarding attorneys' fees I think that the extreme case which would mandate the imposition of all of the attorneys' fees upon Levy's shoulders is simply not made out.

I will cover two other points, and that is that the judgments for damages are to be awarded on the counterclaims and on each of them against plaintiff Adam VII Limited and against Morris Levy, who has been named as an additional defendant on counterclaim. There is no factual basis for awarding any judgment on the counterclaims against plaintiff

mdh

Big Seven Music Corporation.

Furthermore, all the defendants who have asserted counterclaims are entitled to an injunction against Adam VIII and against Levy forbidding any further marketing or advertising or promotion of the Roots album.

Are there any comments raised specifically by the findings? I want the defendants to submit appropriate judgments. You had something about that foreign sales, Mr. Schurtman.

MR. SCHURTMAN: I had something about the foreign sales, but as far as judgments are concerned may I ask that the judgments be held up until the entire case is concluded so that your Honor may incorporate everything in a single judgment.

THE COURT: Fine. Now what about the foreign? You had a question.

MR. SCHURTMAN: Yes. On the foreign sales, your Honor, I understood the defendants' claims to be that they were not seeking anything for foreign sales. There was no proof as to what the foreign sales had been. All you have is a schedule which threw in certain figures without any supporting schedules for the foreign sales.

THE COURT: We did have proof about the prices in Canada and in foreign countries.

MR. PRETTYMAN: We are not claiming foreign sales in the sense of EMI sales outside the United States, but you will remember that under the reduction from 6.95 to 5.95 you obviously include all the sales Capitol failed to make and they included the Canadian sales, the United States and the sales --

THE COURT: It is not sales Capitol failed to make, it is the sales Capitol made on which they had the reduced price.

MR. PRETTYMAN: I'm sorry, I misspoke myself.

THE COURT: I was under the impression in the record there was information about the prices both in Canada and in foreign countries and the sales there. If I am wrong I will amend that.

MR. SCHURTMAN: There is no proof in the record of what the prices were in foreign countries. At least it isn't focused on it.

MR. PRETTYMAN: I have it right here. In Exhibit DL --

THE COURT: DL is a summary. I am quite positive there is the backup for the prices, but if you haven't got the backup for -- and there is the backup for the 65,000 Canadian units. That's in Exhibit --

MR. SCHURTMAN: Your Honor, that is another

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summary to which your Honor said you would give little weight.

THE COURT: No. Exhibit DG.

You check that. It is very late, and if that has to be amended that can be very easily done. I think there is support for everything except possibly right at the moment I can't think of the source for the 30,000 international, but that can be checked out.

MR. PRETTYMAN: Your Honor, would you entertain a motion to issue a temporary restraining order against the disposal of accounts pending the entry of a judgment? We are concerned about we do not know Mr. Levy's current financial situation or the current financial situation of his companies but there have been indications there may be a problem there, and we certainly wouldn't want any dissipation of assets.

MR. SCHURTMAN: I don't know the basis for any such order, your Honor.

THE COURT: Wait a minute. I don't want any dissipation. We have had this trial and I do not want to issue injunctions and temporary restraining orders where there is no reason to do so, and I very much don't want to get into that tonight because it is very late.

All I say to you, I would just state orally

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that it is incumbent upon Mr. Levy and his companies not to do anything in fraud of their creditors and I am sure you know that obligation, he knows it, and really nothing more needs to be said. If anything more needs to be said I will take it up at another time.

MR. PRETTYMAN: Thank you, your Honor.

THE COURT: We have to finish up the one last remaining phase of the case, and how long will that take?

MR. McHUGH: Your Honor, may I make one inquiry on the record. You declined to award punitive damages to Apple in this case and you awarded the three other defendants. I want to be clear on the record that was not an oversight.

THE COURT: It was not an oversight. I cannot award compensatory damages to Apple and I am not awarding any punitive damages to them.

MR. BERGEN: I assume also your damage award to Mr. Lennon that includes the Section 51 compensatory, because you did not specifically mention that. You mentioned the punitive damages on Section 51, but you did not mention specifically --

THE COURT: I got rushed. I'm very sorry.

Let me go back on the record.

Mr. Bergen has reminded me of one claim of

Mr. Lennon for compensatory damages which I had in my notes and omitted for some reason, and that is the claim for compensatory damages under Section 51 of the Civil Rights Act.

I make the following findings. First, it is clear that in issuing the Roots album and in putting the commercials on television Levy and Adam VIII violated Section 51 in using Lennon's name and picture for trade purposes without Lennon's permission.

The record also contains a substantial body of evidence indicating that the particular picture of Lennon used on Roots, the method of presentation of the Roots album, was of a standard of artistic production which was greatly and sharply at variance with the standards of quality which Lennon insists upon with respect to his own albums.

Furthermore -- and this may verge on other claims of Lennon aside from the Section 51 claim -- there is convincing evidence that the quality of the music in the Roots album was of a standard not tolerated by Lennon, and that two songs were included which contain elements that are out of tune with each other and which were scrapped when Lennon produced his own Rock and Roll album for Capitol or released his own Rock and Roll album through Capitol.

There is no doubt in my mind that this situation

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has caused damage to Lennon's reputation, and has produced some damage to him as an artist. The precise dollar amount of such damage is difficult to arrive at. The Roots album only sold 1,270 copies. The TV advertising occurred and was seen undoubtedly by far more than 1,270 people, but all in all it is difficult to assess a precise dollar amount. However, in view of Lennon's standing as an artist and the high value which attends his reputation I am awarding compensatory damages for the elements that I have just described in the amount of $35,000.

I wish to add on this point that there has been a great deal of evidence produced in the record as to the exact status and movement of Lennon's career. I am convinced of the fact that Lennon perhaps has a career whose balance is somewhat more delicate than the career of other artists. Lennon has attempted a variety of ventures both in popular music and avant-garde music. Lennon's product tends to be somewhat more intellectual than the product of other artists. What this means in my view is that Lennon's reputation and his standing are a delicate matter and that any unlawful interference with Lennon in the way that Levy and the Roots album accomplished must be taken seriously. Consequently, I award the damages that I award.

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BIG SEVEN MUSIC CORPORATION, et al.

- against - 75 Civ. 1116

JOHN LENNON, et al.

New York, New York
April 14, 1976 - 12:00 noon

(Trial resumed)

MR. SCHURTMAN: At the last session we were taking evidence. I was in the middle of examining our accountant, Mr. Zucker. I wonder if I can ask your Honor's guidance as to the rest of your schedule for the rest of the week.

THE COURT: I am probably freer than you are. I know we have the holidays coming up.

MR. SCHURTMAN: Will we work all day today?

THE COURT: I am prepared to work all day. I know the people who have problems about the Jewish holidays, and I would like to do as much as we can because this is the twentieth day of this trial, If there is a way to use as much of this day as possible, I would appreciate it.

MR. SCHURTMAN: How about tomorrow?

THE COURT: Tomorrow I am available.

MR. SCHURTMAN: Mr. Kahl is under subpoena and he wants to be cross-examined and Mr. Kahl is one of the

gentlemen who has to leave at 2 o'clock. I wonder if we should put Mr. Kahl on first so at least he can be released because --

THE COURT: Can you examine Mr. Kahl now intelligently?

MR. BERGEN: I believe I can. I would like to know whether Big Seven is going to rely on portions of Mr. Kahl's direct testimony where he testified about the avlue of this come-together settlement.

MR. SCHURTMAN: We do intend to rely on that.

MR. BERGEN: I can cross-examine him now.

THE COURT: Fine. Let's have Mr. Kahl and he can get away.

P H I L I P K A H L, resumed.

THE COURT: I will deem this cross.

CROSS-EXAMINATION (Cont'd.)

BY MR. BERGEN:

Q Mr. Kahl, at page 1385 of your transcript, your testimony in the main part of the trial back in January, you testified that "There are many songs of the Beatles or John Lennon or George Harrison of the Beatles that have been recorded by other artists."

Can you tell me any songs or can you name any

songs that have been recorded, any John Lennon songs that have been recorded by other artists?

A I know of George Harrison who wrote a song --

Q I am asking you do you know any songs recorded by John Lennon that have since been recorded by other artists?

A From inception?

Q Yes.

A I would have to study that. I would not know that answer at this moment.

THE COURT: I was asking my clerk to get the transcript and I didn't hear that.

MR. SCHURTMAN: While we are waiting for the transcript, I am looking at my copy. Mr. Bergen made a statement that his cross-examination was cut off by you. I wonder if he can point to the page. I see pages and pages of cross-examination.

MR. BERGEN: I can, as a matter of fact.

MR. SCHURTMAN: I would appreciate it. I can't find it.

MR. BERGEN: I believe it is page 1423, the top of the page.

THE COURT: It is not material. Mr. Kahl is an employee of Mr. Levy. He stands as a witness in that position

when he is being examined by the opposing party. Whether we call it direct or cross is entirely immaterial. It is just something to put at the top of the page. I will tel he reporter to call it cross and I am not saying whether I cut Mr. Bergen off or not, I don't care.

(Record read)

Q Do you know how many cover records there have been of Ya Ya since Mr. Lennon recorded Ya Ya in September of 1974 on Walls and Bridges?

THE COURT: What is the term you used?

MR. BERGEN: Cover records, records by other artists of the song following Mr. Lennon's recording on Walls and Bridges in 1974.

A To the best of my recollection there may have been one or two. I don't recall the artist. I can check that out and get that information for you.

MR. BERGEN: Let me mark this document. I left my exhibit list back at the office, your Honor. It is on the way down. I am not sure what the next exhibit is.

(Defendants' Exhibit DR marked for identification.)

A In fact there was a recording done by a producer, Charlie Green, recently, by a group called the Avaros, and it was just released about three, four weeks ago

on Ya Ya.

THE COURT: Who recorded it?

THE WITNESS: A group called the Avaros.

Q Is that on Roulette Records?

A It was bought by a producer called Charlie Green who recorded it as an independent producer. He went to various record companies evidently and he came to us and we bought the master.

Q Roulette Records?

A Yes.

THE COURT: Who bought the master?

THE WITNESS: Roulette Records.

THE COURT: That is a Levy company, is it?

THE WITNESS: Yes, your Honor. But the producer is an independent producer who goes around to various record companies. He evidently went to others. He came to us and he went to our A&R department, they liked the record, they played it for the product meeting and they accepted the master and we bought the master and released this record about three, four weeks ago.

THE COURT: I am just confused.

You bought the master from Charlie Green?

THE WITNESS: An independent producer, yes. He produces for various record companies.

THE COURT: Has Roulette put this out on its album of its own?

THE WITNESS: A single, your Honor.

THE COURT: A single?

THE WITNESS: Yes, your Honor.

THE COURT: When was it released?

THE WITNESS: Approximately two, three weeks ago, your Honor.

Q I show you a document marked Defendants' Exhibit DR for identification and ask you if you can identify that, please?

A Yes.

Q Can you tell the Court what that is?

A This is a record we keep in our publishing files of licenses from various record companies that record our copyrights.

Q Is that called a song sheet?

A More or less, yes.

Q What song is that song sheet for?

A Ya Ya.

MR. SCHURTMAN: May I see what you are questioning the witness about?

MR. BERGEN: Yes. You produced this.

THE COURT: What is this DR for identification?

THE WITNESS: It is an index of the copyright Ya Ya when we obtain licenses from various record companies who record this composition and we keep a file for many reasons, one for royalties when they are due --

THE COURT: In other words, people that record get licenses from you?

THE WITNESS: We get licenses from the Harry Fox office who in turn the Harry Fox office gets the licenses from the record companies. He is our trustee who collects the money for representing Big Seven. The Ya Ya composition is owned by Big Seven, your Honor.

THE COURT: And the song sheet for Ya Ya -- in other words, if somebody loses a recording, they have to get a license from Big Seven?

THE WITNESS: They can record it and place it with a record company, or a record company can record it. Then the record company issues a license for the statutory rate and we have a trustee called the Harry Fox office. They write to the Harry Fox office who recorded the song, releasing the song, whether it is a single or album, and they issue a license to the record company. The record company signs this license under the statutory rate and then we get a copy of this and we file the copy.

THE COURT: You ultimately have to license that

record company?

THE WITNESS: Exactly.

THE COURT: This is a sheet showing such licenses?

THE WITNESS: Yes, sir, your Honor.

Q Doesn't this sheet also show where there have been licenses issued of the original song, where it is compiled, where it is put into a record collection?

A I don't understand your question.

Q This license includes not only licenses to artists doing the song for the first time, but also licenses covering reissues of so that have already been recorded, doesn't it?

A Yes, because we have to have a file for that because of the royalty. You collect the royalty and you have to go to the file. We refer to that file. Sometimes we have the copyright, maybe a rendition that is changing, we copyright that recording.

Q Was the original recording of Ya Ya done by Lee Dorsey?

A To my best recollection, yes.

Q So whenever Lee Dorsey's name appears under licenses, the heading "Licenses" or DR for identification, that indicates that it is a license for his original version

to be put in another record, isn't that correct?

A That is possible. It could happen.

Q Now, directing your attention to the third page of Defendants' Exhibit DR for identification, there is a reference to Capitol Records -- EMI of Canada Limited, SK 3416, John Lennon, 9/20/74.

Is that a license covering Mr. Lennon's recording of Ya Ya and Walls and Bridges?

A It possibly could be, yes.

Q There is also another reference to a license to Mr. Lennon for February 13, 1975. Is that the indication for the recording of Ya Ya on the Rock and Roll album?

A There is the number Apple 3419. We used that as a reference and we check that with the LP cover which has the number so that we know it is that version of the rendition.

THE COURT: I am not following this. Maybe if I could look at that exhibit.

MR. BERGEN: I am sorry,your Honor. I have only one.

THE COURT: You offer it in evidence?

MR. BERGEN: Yes.

THE COURT: Is there any objection?

MR. SCHURTMAN: No objection.

[Defendants' Exhibit DR received in evidence.]

THE COURT: Mr. Bergen, so I get the point, what do you say it shows?

MR. BERGEN: What I am trying to show, your Honor, is after Mr. Lennon recorded Ya Ya in September of 1974 in Walls and Bridges, and February of 1975 on Rock and Roll, there was not any great rush of other artists to go out and make what the plaintiff keeps referring to as these covers.

THE COURT: The technical things it shows, I didn't have that before me and I don't understand.

MR. BERGEN: What that shows -- and Mr. Schurtman and Mr. Kahl can correct me -- those are a list of licenses that were issued by Big Seven for the song Ya Ya. Now, it not only shows the licenses for an artist to record the song, but it also shows the licenses where a version of the song -- for instance, the original version by Lee Dorsey was used again and again and again in re-packages, in packages of records that consist of like The Greatest Rock and Roll Hits of '63.

THE COURT: Is that right?

THE WITNESS: Well, he asked me a question about the '74 version of Ya Ya, and he asked me about the licenses of '75.

THE COURT: Does this show the licenses granted

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by Big Seven for Ya Ya?

THE WITNESS: Yes, your Honor.

THE COURT: Does it show licenses for different artists to record Ya Ya?

THE WITNESS: Yes, your Honor.

THE COURT: Does it show a version recorded is reissued in different forms?

THE WITNESS: Yes, your Honor.

THE COURT: Okay.

BY MR. BERGEN:

Q Mr. Kahl, I want to show you the Rock and Roll album, SK 3419 .

A Yes.

Q That is the number that corresponds with the number there?

A Yes.

Q So that this license referred to on the Defendants' Exhibit DR, on the bottom of the third page, is the license for the version of Ya Ya on Rock and Roll?

A That would be the second version.

Q Right. Now, can you tell me looking at the Defendants' Exhibit DR how many cover records there have been of Ya Ya since the Lennon recordings in September, 1974, and February of 1975?

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A The version of John Lennon's?

Q No, I am asking you a specific question. Can you tell me how many cover records there have been since then, referring to Defendants' Exhibit DR?

THE COURT: We got two time periods.

Q Let us take it since September, 1974.

A I want to explain the '74 version and '75 and then I will give you how many have been recorded. May I do that?

THE COURT: No.

Q I would like an answer to the question.

A The version of 1974, the interpretation was such that it was a bad interpretation of the song --

THE COURT: We have had that. Let us say between the time Walls and Bridges came out and the time in February of 1975, how many cover records were there for Ya Ya?

A The Evaros.

MR. BERGEN: What was the time period?

THE COURT: September '74 to February '75.

THE WITNESS: In February '75 my best recollection I would say none.

Q Now, how about after February, 1975?

MR. BERGEN: I am directing the witness'

attention to the bottom of Page 3 of DR, your Honor.

Q Since the Lennon recording in February of 1975

A Lee Dorsey, a re-issue.

THE COURT: It was a re-issue of Lee Dorsey's record?

THE WITNESS: Right, your Honor.

THE COURT: By whom?

THE WITNESS: Vee-Jay Records.

THE COURT: Spell that.

THE WITNESS: The record company, your Honor, V-e-e - J-a-y Records.

THE COURT: That was not the original. When was it originally recorded by Lee Dorsey?

MR. BERGEN: I believe in 1963, your Honor.

Q Now, any other cover records after February, 1975?

A Not cover records, but re-issues, plus one cover record after the date of February. That would be the Evaros.

THE COURT: When was that issued?

THE WITNESS: About two, three weeks ago.

THE COURT: That is the one you mentioned?

THE WITNESS: Yes, your Honor.

MR. BERGEN: Just so the record is clear, I

think Defendants' Exhibit DR also shows there was one other cover record, at least a license issued, to Clairidge Records for an artist named Frankie Gee, and the date is 9/30/75.

THE COURT: Go ahead.

Q Do you know who FrankieGee is?

A Yes, he is not a known artist; he is an unknown artist, but it was a record that was released after Lennon.

Q Can you tell us how many versions there have been, cover records of You Can't Catch Me since Mr. Lennon's recording in February of 1975?

A One that I know of by Steven Stills.

THE COURT: Have you got the document?

MR. BERGEN: Yes, I do.

Q I show you Defendants' Exhibit DS for identification, Mr. Kahl. Is that the song sheet for You Can't Catch Me?

A That is correct.

MR. BERGEN: I offer it in evidence, your Honor.

THE COURT: Any objection?

MR. SCHURTMAN: No objection.

THE COURT: Received.

[Defendants' Exhibit DS received in

evidence.]

Q Does Defendants' Exhibit DS reflect the license to Mr. Stills?

A Right.

THE COURT: You say there is a license to whom?

MR. BERGEN: Steven Stills, dated January 8, 1976.

THE COURT: Just so I have it clear, between September, 1974 and February, 1975, there were no cover records or licenses issued?

MR. BERGEN: That is correct.

THE COURT: After February, 1975, you had three items, a re-issue of a Lee Dorsey record, the Evaros record two or three weeks ago, and the license issued to Clairidge Records?

MR. BERGEN: That is correct. Actually, there were several other re-issues of the Lee Dorsey recording during that period. I can show them to you. I think there are four other licenses covering the re-issue.

BY MR. BERGEN:

Q Mr. Kahl, are you familiar with a group called the Rolling Stones?

A Yes.

Q Would you say that the Rolling Stones are a

very popular rock group?

A Yes, sir.

Q How would you rate the Rolling Stones in comparison to John Lennon in terms of popularity?

A Very popular, almost as popular or as popular as Mr. Lennon.

Q Would it have been very important to have the Rolling Stones record a song from Big Seven's catalog?

A Yes, it would.

Q And if that was done would that result in a number of cover records following that recording?

A I would say yes.

Q Would it also result in an increase in the performer's income?

A Yes.

Q From that song?

A Yes.

Q Would that also result in an increase in sheet music sales for You Can't Catch Me?

A I would say yes.

Q Do you know whether the Rolling Stones ever recorded You Can't Catch Me?

A To the best of my recollection I do not; I don't think so.

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Q I show you Plaintiffs' Exhibit 201, which is the John Landau review of the Lennon Rock and Roll album and I refer to a paragraph that starts with You Can't Catch Me and ask you to read that paragraph, please, to yourself, just that one paragraph.

Now, does that paragraph refresh your recollection that the Rolling Stones recorded You Can't Catch Me in 1975?

A I don't know anything about the Rolling Stones' recording.

Q 1965.

A That is ten years ago. The Rolling Stones were not as popular ten years ago as they are today. To my best recollection, I do not recall them recording a song, because I was not with Big Seven at that time.

Q Let me show you Defendants' Exhibit DS for identification which is the song sheet for You Can't Catch Me, and I refer you to the date January 29, 1965, a license to London Recording for the Rolling Stones. Does that indicate that the Rolling Stones recorded You Can't Catch Me?

A Yes.

THE COURT: That is back in '65?

MR. BERGEN: Yes.

Q It is your testimony the Rolling Stones were not a popular group in 1965?

A I didn't say that.

THE COURT: Wait until he finishes his question.

DS shows the Rolling Stones recorded You Can't Catch Me in 1965. What is the next question?

Q Is it your testimony that the Rolling Stones were not popular in 1965?

A They were not as popular in 1965 as your question to me before, as popular as John Lennon. I would say in 1965 to the best of my knowledge they were not as popular.

THE COURT: As popular as what?

THE WITNESS: As they are currently popular.

Q In looking at Defendants' Exhibit DS, can you tell me in the next five years how many cover records were

made of You Can't Catch me?

THE COURT: Beginning what, '65?

MR. BERGEN: Yes, your Honor.

MR. SCHURTMAN: Is he asking the witness to read from the exhibit? The exhibit speaks for itself.

THE COURT: If you have analyzed it and you can tell us, we will take your word for it, Mr. Bergen.

MR. BERGEN: I can tell you quickly that there was a version in November of 1965 by Sleepy Labeff. There was a version by the Blues Project, December 13, 1966, and I believe the next version was in January of 1970 by a group called Love Sculpture.

MR. SCHURTMAN: How about the others on the list?

MR. BERGEN: I am talking about cover records, not the releases of the original version by either the Rolling Stones or releases of the Blues Project.

MR. SCHURTMAN: I am looking at the bottom of the first page which shows Tommy Flanders, Danny Kalb, and so forty. You don't have that, March 24, 1969?

MR. BERGEN: Is that a group?

MR. SCHURTMAN: What do you think it is?

MR. BERGEN: I don't know. If it is a group, it is another one.

MR. SCHURTMAN: What about the Barkay's on

May 29, 1970?

MR. BERGEN: I was saying in the next five years, and I included the Love Sculpture in January 1970.

MR. SCHURTMAN: But you excluded the Barkay's.

MR. BERGEN: They were five months later. I am talking about the next five years.

THE COURT: Is there something called a cover record, does that have a meaning?

THE WITNESS: It has a meaning.

THE COURT: What is a cover record?

THE WITNESS: A cover record is when a record is originally recorded by an original artist and somebody else does the song after the original artist has recorded the song, and whether it is popular or not popular, we call it a cover record.

THE COURT: You asked about how many cover records of You Can't Catch Me in 1965 through '70. How many as a result of your discussion were there?

MR. BERGEN: I think there was Sleepy Labeff, one, and that was in 1965, the Blues Project in late 1966. I believe that the one that Mr. Schurtman just pointed out is under Quality Records, Limited, which is the Blues Project, just not by their name, but the manes of the individual artists. It is the same record company as the one right

before it.

MR. SCHURTMAN: I have no idea. Maybe the witness knows.

THE WITNESS: If I may look at it.

MR. BERGEN: There was one in January 1970 by the Love Sculpture and one in May 1970 by the Barkay's which appear to be a group from Canada, because the license is to Warner Bros. Records of Canada. So we have four.

MR. SCHURTMAN: You are limiting it to a five-year period?

MR. BERGEN: Yes.

Q Mr. Kahl, Mr. Zucker has testified about some meetings that he had with you and Mr. Levy in preparing some scheduled, specifically a schedule with respect to Oye Como Va. Do you recall those meetings?

A Yes.

Q How many meetings were there?

A I don't recall how many, but we were meeting quite often.

Q I am talking about this particular subject.

A There were a few meetings.

Q Do you recall what was discussed at those meetings?

A Well, they discussed the value of the cover

record that had taken place many years after a song like Oye Como Va, which had laid sort of dormant, and an artist like Santana records the song, and it is also known as a cover record. Many years later, although in its original form it was never a popular record, its original record, Santana makes it an international hit all over the world. I formed that to Harvey Zucker and I explained to him as a professional man in the industry that at any given day, any title that we have in our catalog that has been recorded prior by an artist, whether of recognition or non-recognition can record a song overnight or maybe three weeks later, or four weeks later make it a hit. Sometimes just in the United States and sometimes all over the world.

We have many songs that have been international hits all over the world and this is the case of Santana.

Q Can you tell us why Oye Como Va was selected?

A They asked me to select a few titles and I did the research on that particular one and a couple of the others.

Q Was there a reason why You Can't Catch Me wasn't selected?

A He asked me to get other songs besides You Can't Catch Me.

Q Oye Como Va is a Latin song?

A Modern Latin, progressive jazz.

Q And You Can't Catch Me and Ya Ya are rock and roll songs?

A Just the popular rock and roll song. I would classify popular too because we printed popular sheet music.

Q There has been reams of testimony that they are rock and roll songs.

A Yes.

Q Wouldn't it have been better for comparison purposes to show what You Can't Catch Me has done in terms of cover records rather than Oye Como Va?

A I did other songs with them.

Q I asked you wouldn't it have been better to do it for You Can't Catch Me?

A Not necessarily.

Q Why?

THE COURT: That is something for me to worry about. If they presented the wrong evidence, then they presented it. Their strategy, you don't have to get into that.

Q Oye Como Va was originally recorded by Tito Puente, wasn't it?

A That is correct.

Q Mr. Kahl, I show you Plaintiff's Exhibit 201-A,

which is the song sheet for Oye Como Va. Does that indicate that the original version by Tito Puente didn't have any lyrics and that it was an instrumental? I am referring you to the top of the first page of the exhibit.

A Original version, no lyric.

Q Does that mean that there were no lyrics on that version?

A There were no lyrics in that version.

Q And the Santana version did have lyrics?

A Not a complete lyric. It had a title of maybe two bars of lyrical contents. It is not a complete lyric. It is not a complete lyric. It would be the same where Tito Puente did it. He did the title. He used the title of the song. There is no lyric even to the Santana version. It is the title that is used, four bars, over and over and over, the same four bar words. It is not a complete lyric.

Q Is there any way of calculating the value of John Lennon's recording a song from the Big Seven catalogue?

A Yes.

Q How?

A By the popularity of John Lennon, the sales.

Q I am talking about calculating, putting a figure on the value to Big Seven of having John Lennon record one

of its songs.

A If he recorded the song, it is a hard question to answer in this respect: If I get a song recorded by John Lennon accepted by the public and it is a hit, there is untold amount of moneys you can make. I couldn't put a figure on it. It could be $200,000, $300,000, $100,000. I could never put a figure on it. It would enhance the catalogue. It would do many things. There would be a tremendous amount of covers after that if it is a single. If they took it out of an album -- there are many songs taken out of an album, such as the Lennons and the Harrisons and the Roling Stones, all we talk about today. Many songs that come out, the original LP, singles come out and the single makes a lot of money. The performances are tremendous.

Q Would the fact that a song was made a single out of an album have tremendous impact on whether it made money and helped the catalogue?

A I would say so.

Q If the song was in an album and was not a single, would that lessen the impact of the recording by John Lennon?

A I don't know if it would lessen it. It would be heard and then again somebody may record the song of the

stature of John Lennon. It could be the Rolling Stones. They have done one of our songs. They can go in and do a John Lennon song and give their version and I would make money from the Rolling Stones who are as popular as John Lennon.

Q But the likelihood is it would be more valuable if it were a single?

A From the single, the LP --

Q I am asking you that question. It is more likely to be heard on the radio if it is a single, isn't it?

A Yes, I would say so.

Q I ask you again, is there any way of putting a dollar figure on the value?

MR. SCHURTMAN: If your Honor please, we are in the middle of examining the accountant who is showing you methods of putting on dollar figures. We did not put Mr. Kahl on for that purpose and I suggest he is cross-examining in an area in which there was no direct. That is why we are putting on to show you the projections.

MR. BERGEN: Mr. Kahl testified in great detail on his direct examination about how valuable this settlement was. He testified that it was worth over $200,000.

THE COURT: Where is that testimony? I have got the volume in front of me. Did he put the $200,000 figure on

it?

MR. BERGEN: Page 1385, and he just said it again.

THE COURT: You can certainly examine him about that testimony. Whatever is germane to that testimony you can examine him on certainly.

MR. BERGEN: Maybe it would be easier if you refer the Court to the question I asked him at page 1421 where I believe the witness said he could never calculate a figure.

THE COURT: 1421?

MR. BERGEN: Yes.

THE COURT: Okay. Let me just look at that.

MR. BERGEN: And at the top of 1422 too, your Honor.

THE COURT: Okay.

MR. BERGEN: Also I would like to refer you to the remainder of page 1422 where Mr. Kahl testified that -- that is on his deposition -- that there was no way of figuring out that dollar amount and that he didn't know anybody at Big Seven who could figure it out.

THE COURT: Okay.

Q My last question, Mr. Kahl, is referring back to Defendants' Exhibit DR, the song sheet for Ya Ya, were

there a number of reissues of the Lee Dorsey version of Ya Ya before Mr. Lennon recorded it in 1974?

There were approximately a dozen.

THE COURT: A dozen of what?

MR. BERGEN: Reissues of the Lee Dorsey.

THE COURT: Is that right, Mr. Kahl?

THE WITNESS: Yes, it is, your Honor.

THE COURT: Before what?

MR. BERGEN: Before the Lennon release.

THE COURT: Before September '74?

MR. BERGEN: Yes, your Honor.

Would you mark this Defendants' Exhibit DT.

(Defendants' Exhibit DT marked for identification.)

Q Mr. Kahl, I show you Defendants' Exhibit DT for identification. Is that the song sheet for Angel Baby?

A Yes, it is.

MR. BERGEN: I offer that in evidence, your Honor.

THE COURT: This is of course a Big Seven song?

MR. BERGEN: Yes, it is, your Honor.

THE COURT: And this was one that Mr. Lennon deleted from the rock and roll album?

MR. BERGEN: That is correct.

MR. SCHURTMAN: What is the purpose of the offer?

MR. BERGEN: I just want to show that there weren't any cover records of Angel Baby over the years, even after Rosy and the Originals did the original song.

MR. SCHURTMAN: Lennon dropped the song, so how are we going to show cover records on a song that he didn't make?

THE COURT: I will receive it.

(Defendants' Exhibit DT received in evidence.)

REDIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Kahl, you testified that you couldn't make the projections to figure out how a recording by Lennon would enhance value. Is this something that you asked your controller, Mr. Zucker, to do?

A Yes, I did.

MR. BERGEN: I didn't ask Mr. Kahl if he made projections. I asked him what was the value.

MR. SCHURTMAN: You asked him what methods to use.

THE COURT: The thing he testified about or the subject he testified at the earlier stage was about how much money would have been made if Lennon had recorded these three songs. At the bottom of 1384 and the top of 1385 he

says what it oeuld have meant and he says mechanical royalties, performance money, sheet music, high school orchestrations, and so forth and so on.

MR. SCHURTMAN: That is right.

THE COURT: So whether you call it the value of an artist or projections, I don't know what difference that makes. We are ultimately trying to see if there is any claim and how much the claim is worth for money that would have been made. Isn't that what we are talking about?

MR. BERGEN: Yes, your Honor.

MR. SCHURTMAN: Yes, your Honor.

THE COURT: What question are you now asking?

MR. SCHURTMAN: My only point is that the witness had testified that he didn't do the calculations and the witness has just said in response to my question that he told Mr. Zucker, the controller, to make the calculations once we filed an amended claim.

THE COURT: You are just asking about Mr. Zucker's testimony, all right.

Q One of the cover records, You Can't Catch Me, was made by an artist named Steven Stills. Are you familiar with that artist?

A He is a very popular artist of Warner Bros. and one of our great artists from a group called Crosby, Nash &

Stills.

Q Was that a very successful, popular music group?

A Tremendously successful group.

Q Is Mr. Stills now recording on his own?

A Yes, he is.

THE COURT: Anything else at all from Mr. Kahl?

Q One other point.

On the Plaintiff's Exhibit 201-E, which is Oye Como Va, Mr. Bergen questioned you about the fact that the 1963 version had no lyrics and I believe you gave some testimony on that. Is it correct that starting on March 10, 1971, there was a P&O arrangement with words and music?

A Yes, there was.

Q When did the first Santana version come out? Am I correct that it came out in 1974, February of 1974?

A That is the license, that is correct.

MR. BERGEN: That is not what it showed before. You put in the evidence it was 1971 that the Santana version came out. That is the whole basis of your projections.

MR. SCHURTMAN: I am looking at the song sheet you mentioned.

MR. BERGEN: It is your document.

THE WITNESS: That is a reissue.

MR. BERGEN: Yes, that is a reissue.

THE COURT: What is the evidence now? I am looking at my notes and there was testimony that the thing limped along until 1971 and so forth. Now, what is the problem about the dates?

MR. SCHURTMAN: I am sorry. Santana came out February 2, 1971. I have the wrong date.

MR. BERGEN: There is one in 1970, September, 1970, CBS Records, Santana.

MR. SCHURTMAN: Well, then, the original exhibit we put in was correct. You just said it was not. It came out in 1970, the original Santana version, which is basically what Mr. Zucker testified last time.

THE COURT: Anything else?

MR. BERGEN: I would like to ask Mr. Kahl about 201.

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RECROSS-EXAMINATION

BY MR. BERGEN:

Q Isn't the license for the Santana record, for CBS Records, dated February, 1971, for a single?

A I would have to check that out. One could be a single, one could be an album. The single was a hit and it was put out in an album,

Q The Santana version was a single and it was a hit?

A Yes.

Q Isn't the name of Mr. Stills formerly Crosby, Stills, Nash and Young?

A Young.

THE COURT: Anything else?

MR. BERGEN: No further questions.

THE COURT: I think you are finished, Mr. Kahl. You can go.

[Witness excused.]

THE COURT: It is now one o'clock. I could continue for awhile. I have a short criminal matter.

MR. SCHURTMAN: I have no problems, your Honor. Mr. Kahl was the only one who had to leave.

THE COURT: Let us then recess until 2:15.

MR. BERGEN: Mr. Strauss has to leave by like 3:30, four at the latest.

THE COURT: Can we have him right after lunch then?

MR. SCHURTMAN: Is Mr. Strauss a witness?

MR. BERGEN: Yes, he is going to be.

THE COURT: He has been here?

MR. SCHURTMAN: I thought he was here as Mr. Bergen's adviser. If he is going to be a witness, I have no objection to his going first.

3 mmsr

MR. BERGEN: He is not going on first. He is going on in rebuttal. He is going to be here and I want him to be here during all the testimony.

THE COURT: I didn't understand. Well, all right, we will recess until 2:15.

[Luncheon recess taken until 2:15 p.m.]

l mmsr

A F T E R N O O N S E S S I O N

[2:15 p.m.]

MR. SCHURTMAN: If your Honor please, before I continue with my next witness, I have a preliminary matter that I would like to take up which I think is of some serious nature. Some information has just been brought to my attention concerning reports made by Capitol Records of Canada to the Harry Fox Agency regarding their Canadian sales of Rock and Roll. According to the Harry Fox Agency, Capitol has represented that the total Canadian sales through December 31, 1975, were 29,537. Your Honor may recall the representation as set forth in Defendants' Exhibit DL was that Canadian sales were 65,000 units, or twice as much as this representation. Your Honor based two of your two key findings on this 65,000 figure.

THE COURT: I relied on that. No question.

MR. SCHURTMAN: I would like to offer the Harry Fox report as an exhibit, and I believe some explanation should be given to your Honor why different figures were submitted to you.

THE COURT: Can you do that, Mr. Bergen? Just convey this to Mr. Prettyman and see what we can do. I don't want to have any kind of hearing on that. In the absence of Capitol's attorneys and so forth, I don't even

want to receive it into evidence, because there might be some serious objections. See what you can do about it.

MR. SCHURTMAN: May I have it marked as a plaintiffs' exhibit for identification at this time?

THE COURT: Yes, certainly.

[Plaintiffs' Exhibit 402 marked for identification.]

MR. SCHURTMAN: With your Honor's permission I will have copies made of it. We don't have any extra copies. Then I will furnish them to Mr. Bergen, Mr. Prettyman, Mr. Granett , and anybody else who is entitled to a copy. But at some point, your Honor, I assume you will take this matter up, because it does raise serious questions.

THE COURT: Mr. Bergen, you act as liaison. Why don't you call Mr. Prettyman about it in the next day or so. If we have to have another hearing, what do we have to do? I don't know.

MR. BERGEN: May we see a copy of it now?

MR. SCHURTMAN: You can see it right now. I will need it back for copies. That is the only copy I have.

THE COURT: What is next?

MR. SCHURTMAN: Mr. Zucker.

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H A R V E Y Z U C K E R , recalled.

THE COURT: You are still under oath.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Zucker, at the last session you explained to the Court Plaintiffs' Exhibit 301 in evidence, which showed domestic mechanical royalties due from John Lennon recordings with respect to You Can't Catch Me and the song that was not recorded at all. Let me show you Plaintiffs' Exhibit 301. You based Rock and Roll sales on 376,000 units.

A That is correct, sir.

Q Has it since been called to your attention that the Rock and Roll sales, actual sales, have been listed as 342,000 units?

A Yes, that is correct.

Q And then I asked you to re-compute your figures based on that 342,000.

A Yes.

Q I show you Plaintiffs' Exhibit 301A. Does that reflect your re-computation?

A Yes, it does.

THE COURT: Can I see that? You will just have

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to go over that. I did not have the document in front of me. I did not understand. What is being recalculated?

MR. SCHURTMAN: Exhibit 301, your Honor, shows the mechanical royalties that would have been due on the third song that Mr. Lennon did not record, and one of the questions that we are leaving open until your Honor makes a finding is whether Lennon's next album in which he should have recorded the third song was Walls and Bridges or Rock and Roll. As you know, there is a dispute on that point. Now, if it had been Walls and Bridges, then it is based on 405,000 units; if it is Rock and Roll, Mr. Zucker had originally computed it on 376,000 units, because he had an earlier sheet which did not show certain returns. We have since pointed out to him that this figure that has now been accepted as actual sales in this Court is 342,000. And I asked him to recompute those figures based on 342,000, which he has done.

THE COURT: This is shown in 301A?

MR. SCHURTMAN: Yes. So I would really request permission to either substitute 301A for 301, which is not accurate in that one regard.

THE COURT: Why don't you make the substitution. We won't have 301. Substitute 301A for that.

While I am going through my papers here, I

notice that I have on the bench Exhibit 201A, and it is a song sheet for Oye Con/'o Va . The tag did not get marked in evidence. But is this supposed to be in evidence?

MR. SCHURTMAN: Yes.

THE COURT: Is there any objection to that?

MR. BERGEN: No.

THE COURT: We will mark it in evidence.

[Plaintiffs' Exhibit 201A received in evidence.]

MR. BERGEN: Do we have a photocopy of 301?

MR. SCHURTMAN: Very well, your Honor, I have made the substitution. Exhibit 301 now shows a recap calculated on a total due of $10,160. Just to put it in context, would your Honor want the witness to explain briefly what it is?

THE COURT: I remember that quite well.

MR. BERGEN: May we have on the record what it is they claim, whether it is to have been in Walls and Bridges or Rock and Roll?

MR. SCHURTMAN: We say it is Walls and Bridges.

MR. BERGEN: According to the settlement it was supposed to be Walls and Bridges?

MR. BERGEN: According to the settlement it was supposed to be the next album, and the next album was

Walls and Bridges. That is our position.

BY MR. SCHURTMAN:

Q Now, Mr. Zucker, you may recall the last time you testified about Exhibit 302 and you had a question mark for foreign royalties because we did not have the figures for foreign sales, and the Court directed EMI to furnish certain figures for foreign sales. Certain figures were furnished to us.

Did I then ask you to recompute Exhibit 302 based on the foreign sales figures furnished to us by EMI?

A Yes.

Q I show you what I have tentatively marked 302A. Is that your recomputation containing foreign figures?

A Yes, it is.

MR. BERGEN: May I have in evidence where EMI gave you the foreign figures?

MR. SCHURTMAN: Yes. Mr. Gold, of the law firm of Granett & Gold, furnished me with an exhibit containing foreign figures, which we have marked Plaintiffs' Exhibit 302B for identification. I have no objection to offering it in evidence.

THE COURT: Let us have it marked.

[Plaintiffs' Exhibit 302B received in

evidence.]

MR. SCHURTMAN: For the record, 302B are the foreign figures that were furnished to me by EMI's attorneys, with the exception of the three handwritten numbers in the right-hand side of the exhibit, which I understand are Mr. Zucker's computations.

THE COURT: This is for Walls and Bridges?

MR. SCHURTMAN: Yes, this is for Walls and Bridges.

Q I started to ask you, Mr. Zucker --

MR. BERGEN: Is there a similar exhibit for Rock and Roll, the foreign figures? Or is it just Walls and Bridges?

MR. SCHURTMAN: Just Walls and Bridges. Mr. Bergen, you gave us Answers to Interrogatories which contained the information on Rock and Roll for foreign.

THE COURT: Are you introducing 302B?

MR. SCHURTMAN: 302 has been marked at Mr. Bergen's request. 302A is a recomputation of 302. So I wonder if we could do the same thing.

THE COURT: Let us have that corrected, 302.

MR. SCHURTMAN: Let me substitute this for 302.

THE COURT: What is the correction in 302?

MR. SCHURTMAN: That we have added foreign figures for Walls and Bridges based on the figure supplied by EMI.

May the record show that 302 in evidence now shows figures for the exclusion of one song in the case of Walls and Bridges, and that there is a total of domestic and foreign of $30,053, and in the case of Rock and Roll there was a total of domestic and foreign of $23,712.

Q Are those the figures that you recomputed?

A Yes, they are.

MR. BERGEN: Your Honor, if the plaintiff is taking the position that Walls and Bridges was to be the next album, I submit that 302 is meaningless, at least, the second part of it, where it says one song excluded on Rock and Roll.

THE COURT: These are all calculations. Is there a copy of the new 302 that I can have?

MR. BERGEN: I don't know where you get the figure on 302 of 16,872 if you have not introduced into evidence the Rock and Roll foreign figures from EMI that were given to you.

MR. SCHURTMAN: They are based on your figures.

MR. BERGEN: Not my figures. I didn't give you any figures. Maybe EMI did, but I didn't.

MR. SCHURTMAN: Then they are EMI's figures.

THE COURT: We will take a short recess, please.

[Recess.]

THE COURT: The last thing on the record was a question about whether there was a basis for the figures in 302 as revised.

MR. SCHURTMAN: I have the basis here. I offer as Plaintiffs' Exhibit 303 the answers to plaintiff's interrogatory No. 32, and let me read the question into the record. 302 says:

"State whether Rock and Roll has been sold outside of the United States, and, if so, state by country the total sales of Rock and Roll outside the United States."

We originally received certain figures from Capital and EMI pursuant to your Honor's direction last week. Mr. Gold, of Granett and Gold, obtained up-dated figures from EMI, and he handed me these up-dated figures. They are in his handwriting, and they update the answer to the interrogatory, and I would like to offer that as Plaintiffs' Exhibit 303.

MR. BERGEN: May I see it?

[Plaintiffs' Exhibit 303 marked for identification.]

2 p.m.

MR. BERGEN: Just one more point on this one. This 303 shows the unit sales but it doesn't show the derogation of dollars to arrive at the 16,872.

MR. SCHURTMAN: I am coming to that next.

THE COURT: Do you have any objection to 303?

MR. BERGEN: No, your Honor.

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(Plaintiff's Exhibit 303 received in evidence.)

Q Based on Exhibit 303, did you make a computation of mechanical royalties on foreign sales of rock and roll?

A Yes, I did.

Q Is your computation reflected in Exhibit 303-A?

A Yes.

MR. SCHURTMAN: I offer Exhibit 303-A in evidence.

***

(Plaintiff's Exhibit 303-A marked for identification.)

MR. BERGEN: No objection, your Honor.

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(Plaintiff's Exhibit 303-A received in evidence.)

Q Mr. Aucker, when you were on the stand last week I had started to ask you some questions about the cover records and you had just gotten to testify about a song called Oye Como Va.

Were you here this morning when Mr. Kahl was examined by Mr. Bergen?

A Yes, I was.

Q A question came up as to why you picked a song like Oye Como Va, which had nothing to do with John Lennon, when you had available to you such songs as Ya Ya and You Can't Catch Me, both of which were recorded by Mr. Lennon in the rock and roll album. Can you explain that to the Court?

A Yes, I can. I would like to say that that choice was entirely mine and I would like to tell you why. In order for me to project the amount of income we would have earned, I need a certain number of years' experience to base my projections for the song that was not recorded. Ya Ya and You Can't Catch Me had only one year since the time of recording, and therefore was not proper accountingwise to use it in my projections.

I need a number of years of experience and I did not have them with those two songs.

Q Why do you need a number of years? Over what period of time are you making your projections?

A My projections are based upon a minimum of four, five years, six, seven, eight, nine, ten years.

Q Is that based on the life of a copyright?

A Yes, it is.

THE COURT: A minimum of what?

THE WITNESS: A minimum of four, five, six and

more years.

THE COURT: What is the life of the copyright?

THE WITNESS: I believe it is eighteen years, if I am not mistaken. I am really not too sure.

MR. SCHURTMAN: Twenty-eight years.

THE COURT: Okay.

Q I take it then that in the case of Ya Ya and You Can't Catch Me, the figures that were available to you did not yet form the basis for a projection?

A That is absolutely correct.

Q Did you therefore pick certain songs in the experience of Big Seven where you had enough years of experience on which to base a projection?

A That is exactly correct.

Q Which songs did you pick?

A There were six or seven mentioned and I used those that were brought up in that meeting. I used Oye Como Va, a song Maybe, Daddy's Home, and a song My Boy Lollipop.

Q Let's start with Oye Como Va. I show you Plaintiff's Exhibit 201 for identification. Is this a sheet that you prepared?

A Yes, it is.

Q Is this a sheet based on the past experience of Oye Como Va?

A Yes, it is.

Q I take it it is not a projection, it shows the actual experience?

A These are the actual figures, yes.

MR. SCHURTMAN: Let me offer this in evidence and then I will asl the witness --

MR. BERGEN: 201 is in, isn't it?

MR. SCHURTMAN: We started to offer it the last time and we broke off. I offer 201.

THE COURT: Any objection to 201?

MR. BERGEN: No, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 201 received in evidence.)

Q Looking at Exhibit 201, Mr. Zucker, can you explain to the Court what this exhibit reflects?

A This exhibit reflects the royalty income, both mechanical and performance, that we collected from the time we obtained the copyright until the present time.

THE COURT: On what song?

THE WITNESS: Oye Como Va.

The significant figure is, if you look at the exhibit, are on lines 39 and 40 and on line 17.

Line 17 shows the time Santana recorded Oye Como Va. Lines 39 and 40 show the total amount of royalties

that were earned by the song, both by the U. S. corporation and our 100 percent subsidiary corporations.

If we look all the way over to the right-hand side, you will see that the U. S. corporation retained after deducting royalties, right of royalties, $145,000 and the 100 percent subsidiaries retained $33,000 or $34,000 for a total of $179,000.

Q Is this exhibit intended to show that prior to the time Santana recorded this song, the song was earning relatively little?

A Yes, it was.

Q And then Santana recorded it and what happened after Santana recorded it?

A After Santana recorded it, as you can see from this exhibit, all of the earnings were generated from that one song and cover records issued after that.

Q I show you Exhibit 201-A, which I believe has already been received in evidence -- it was used this morning.

THE COURT: Can I look at 201 for a minute?

MR. SCHURTMAN: Yes.

THE COURT: I know we had this, but what are mechanicals?

THE WITNESS: Mechanicals are royalties that are

earned from record sales.

THE COURT: You have domestic, and under domestic you have gross and net. What is the difference between gross and net?

THE WITNESS: The gross amount of money is the actual amount of money that in this case Planetary Music received. The net amount of money is the net amount retained after paying writers' royalties.

THE COURT: After paying what?

THE WITNESS: Writers' royalties. That is the amount of money that this corporation retains.

THE COURT: What are performance?

THE WITNESS: Performance royalties are royalties generated through radio air play.

THE COURT: Of the record?

THE WITNESS: Yes, of the record, that is correct.

THE COURT: There is one column with the word "ASCAP." What is that?

THE WITNESS: ASCAP is the performance society which collects for the song. There are two main societies, ASCAP and BMI. This particular song belongs to ASCAP --

THE COURT: They are paid a fee every time it is played?

THE WITNESS: That is correct. They in turn send a certain amount of money to the writer, 50 percent usually, and would send 50 percent to the publishing company.

Q You are the publishing companies?

A We are the publisher. We do not pay the writers.

THE COURT: ASCAP is an association of what?

THE WITNESS: ASCAP and BMI, which are two main performance societies that collect the royalties all around the world -- generally all around this country anyway, for radio air play, and they in turn are a collection agency that submits the money to us.

THE COURT: There is a heading Foreign Subs., and there is another heading, Foreign Others. What is that?

THE WITNESS: That is the amount of money earned through either the foreign subsidiaries or other foreign corporations not under our control, and I only separated -- if you take a look at lines 39 and 40 -- the foreign subsidiaries which retain 50 percent and we retain 50 percent. The only purpose of segregating was to be a little more informative.

THE COURT: At the bottom of Foreign Subs. there is the figure $9662, right?

THE WITNESS: That is correct.

THE COURT: And that is split in half. What is

the half again?

THE WITNESS: 50 percent is retained by, in this case, Planetary Music Publishing Corp. and the other 50 percent is retained by our 100 percent foreign subsidiaries.

THE COURT: Go ahead.

Q You mentioned that these figures reflect certain cover records that came after Santana recorded this song. I show you Plaintiff's Exhibit 201-A in evidence, which was previously received, your Honor. I think another witness identified what this sheet is. Could you do so again for the sake of continuity?

A Sure. This shows the domestic and Canadian licenses on the song Oye Como Va that we issue. It does not show any foreign.

Q Directing your attention to the date on the first page of 201-A, which is September 17, 1970, Santana, is this the date on which Santana recorded the song?

A That is the date we issued the license. The recording is I guess within a couple of weeks. I don't really know.

Q Subsequent to the time that Santana recorded this song, can you tell from 201-A how many cover records there were?

A Yes, I can. There seems to be at least six, seven dozen.

Q Cover records?

A Cover records.

Q Are the earnings from these cover records that followed the Santana recording, are these earnings reflected in your Exhibit 201?

A Yes, they are.

Q And to give us the bottom line, what were the additional earnings that resulted from Santana's recording?

A $179,000.

Q Over what period of time is that?

A This is from June of 1971 until December 1975.

THE COURT: Just to be strictly accurate, the 179 is the total earnings for the whole thing?

THE WITNESS: That is correct.

THE COURT: You are saying almost all of it is post-Santana?

THE WITNESS: Right.

THE COURT: Okay.

Q Mr. Zucker, you testified that you selected another song for the same illustrative purposes and I believe you said it was Daddy's Home. I show you Plaintiff's Exhibit 202 for identification. Is this the same type of

sheet that you prepared for Daddy's song?

A Yes, it is.

Q Is that a projection or is that reflective of actual experience with Daddy's Home?

A This is actual experience with Daddy's Home.

Q Can you show to the Court again on this sheet these salient figures that will demonstrate what you are trying to show here?

A Sure.

MR. BERGEN: Can I see a copy of that?

MR. SCHURTMAN: We have given you one.

MR. BERGEN: No, you haven't.

Q Mr. Zucker, will you explain to the Court with reference to Plaintiff's Exhibit 202 for identification what the salient aspects are?

A Sure. The original hit was way back pre-1965. As you can see, the earnings were fairly insignificant until 1973 when Germaine Jackson recorded the song. Germaine Jackson is one of the Jackson 5.

THE COURT: Is it a he or she?

THE WITNESS: It is a he.

THE COURT: When did he record that?

THE WITNESS: Sometime early in 1973 or possibly late '72.

Q Is Germaine Jackson a known artist?

A Germaine Jackson is with the Jackson 5, a very popular recording group.

Since that time we have had substantial earnings from Germaine Jackson and certain cover records issued thereafter. In 1975 the Carpenters -- or late 1974, the Carpenters used Daddy's Home on one of their albums in Japan.

THE COURT: When was this?

THE WITNESS: Late 1974 or early 1975. We do not have all of the earnings from this particular recording since they haven't been submitted to us yet. But we do know that a major group such as the Carpenters did record it.

MR. BERGEN: Can I be clear, did you say in Japan?

THE WITNESS: It was a concert they had in Japan. It is called the Carpenters Concert in Japan, I believe, and they are using it on tour from what I understand.

Q Do you have a license sheet for Daddy's Home similar to the one that you have for Oye Como Va?

A Yes.

Q Does that show when Germaine Jackson recorded it?

A The license was issued on January 10, 1973.

MR. BERGEN: May we see a copy of that, please?

MR. SCHURTMAN: Your Honor, we have only one copy. The last time we were here we had copies of all these exhibits premarked and when we broke up something seems to have happened to them and we haven't been able to find the copies again, so if you bear with me I will let Mr. Bergen look at the one that I will offer in evidence.

THE COURT: You have a song sheet for Daddy's Home?

MR. SCHURTMAN: That is what Mr. Bergen is looking at.

THE COURT: Is that marked?

MR. SCHURTMAN: 202-A. It will be marked.

I offer Plaintiff's Exhibit 202 and 202-A in evidence.

THE COURT: Any objection?

MR. BERGEN: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 202 and 202-A received in evidence.)

Q Just to finish up on 202 and 202-A, what are the total revenues that you earned on Daddy's Home after Germaine Jackson recorded the song?

A I can't really tell from this.

Q What does your exhibit reflect?

A My exhibit reflects the total earnings from

inception to --

THE COURT: You can take those figures off and put them in.

THE WITNESS: I have them in another schedule anyway, your Honor.

THE COURT: Okay.

Is it relevant to bring out the number of cover records after?

MR. SCHURTMAN: That would be on the song sheet.

Can you tell the Court from the song sheet 202-A how many cover records came out after Germaine Jackson?

THE WITNESS: It seems like a good half dozen and you will also notice that in November of 1975 Paul Anka recorded the song for us also. We of course have no earnings on that as yet.

Q Who is Paul Anka?

A Paul Anka is a very popular international recording artist.

Q The next song you mentioned was Maybe. I show you Plaintiff's Exhibit 203 for identification and ask you if that is a similar sheet showing your actual experience with Maybe.

A Yes, it is.

Q What happened in the case of "Maybe" that made you

select that song as an illustration?

A In the case of Maybe, some twelve years after the original recording, Janis Joplin recorded this song.

Q Who is Janis Joplin?

A Janis Joplin was a very popular recording artist in the early seventies, late sixties. One year thereafter the Three Degrees recorded this song also.

Q After Janis Joplin and the Three Degrees recorded the song, was there a jump in earnings?

A Yes, there was. It was quite substantial.

Q Did you have any cover records after that? Do you have a license sheet for this song?

A Yes. Again, here too, there is half a dozen to a dozen. I can't tell offhand.

Q But they are reflected in the license sheet?

A Yes, they are.

MR. SCHURTMAN: I offer as Plaintiff's Exhibit 203 the actual experience with Maybe and as Plaintiff's Exhibit 203-A the license sheet or song sheet showing the cover records on Maybe.

MR. BERGEN: May I see 203-A, please?

MR. SCHURTMAN: Yes.

MR. BERGEN: No objection.

*** (Plaintiff's Exhibits 203 and 203-A received

in evidence.)

Q The final song that you mentioned was a song called My Boy Lollipop. Did you prepare similar sheets showing the actual experience of My Boy Lollipop?

A Yes, I did.

Q I show you Plaintiff's Exhibit 204 for identification. Is this a sheet showing the actual experience of My Boy Lollipop?

A Yes, it is.

Q What happened with respect to My Boy Lollipop that made you select it for purposes of this illustration?

A Well, again the same thing happened. We have an original recording in 1957, nothing really happened with the song. Then somebody in Mercury Records, Millie Small, picked it up, and then thereafter a number of other artists and we find in 1975 a foreign artist, Maggie Maye, unknown to us, recorded the song, and that song in itself, that one recording, has earned $31,000 for us, just that one recording.

Q Do you also have a license sheet --

THE COURT: Who was that, Maggie who?

THE WITNESS: Maggie Maye.

THE COURT: Who is Maggie Maye?

THE WITNESS: An artist in Germany.

THE COURT: And she recorded it in 1975?

THE WITNESS: Yes, 1975.

THE COURT: And the earnings on Maggie Maye's recording alone were what?

THE WITNESS: $31,000, and as of the last reporting, which is December 1975, it was still going very strong and I am sure will have much more than that in the final outcome.

THE COURT: When did Millie Small record it?

THE WITNESS: Millie Small recorded it in 1964-65.

Q Would you say that Millie Small is of the same stature as John Lennon?

A I don't think so.

Q Is the same true of Germaine Jackson?

A That is correct.

Q Is the same true of the other artists that you have mentioned as recording songs?

A That is correct.

Q Based on your experience, would you say that if an artist of the stature of John Lennon records the songs, the results in terms of cover records and future earnings should be more substantial?

MR. BERGEN: Objection. That is pure guesswork.

MR. SCHURTMAN: Based on his experience.

THE COURT: I will overtule the objection.

THE WITNESS: Based upon what I have seen here, the answer is yes.

Q Do you have a license sheet for My Boy Lollipop?

A Yes.

MR. SCHURTMAN: I would like to offer the experience sheet of My Boy Lollipop as Plaintiff's Exhibit 204 and the supporting license sheet as Plaintiff's Exhibit 204-A.

MR. BERGEN: No objection, your Honor.

*** (Plaintiff's Exhibits 204 and 204-A received in evidence.)

Q Mr. Zucker, based on your actual experience with these four songs, have you prepared a projection to indicate what future earnings may be expected from cover records, additional royalties and so forth?

A Yes, I have.

Q Where an artist rerecords a song?

A Yes, sir.

Q I show you Plaintiff's Exhibit 205 for identification and I ask you if that is your projection.

A This is my projection, yes, it is.

Q Would you explain the projection?

A What I have done in this projection is to list

the earnings from the four songs, which totals $386,000 after the second record was recorded. And I simply struck an average of in this case $96,500. My projection was the low side --

THE COURT: What was the total?

THE WITNESS: $386,000.

THE COURT: And the average you devided by 4?

THE WITNESS: Yes, sir.

THE COURT: What was the average?

THE WITNESS: $96,500.

Q Have you also made a projection based on that average?

A Right. My projection was a low of $96,500 and a high of $179,000. The reason I used the $96,500 is because I would assume that an artist of Mr. Lennon's caliber, his stature, would be no less than the average, and the high figure was the high figure of Oye Como Va.

THE COURT: There was a high of Oye Como Va of --

THE WITNESS: $179,000.

THE COURT: And what was the low?

THE WITNESS: My projected low was $96,500.

Q I think the low figure for one of the songs was Maybe, at $41,000.

A Yes.

THE COURT: Okay.

MR. SCHURTMAN: I offer this projection, Plaintiff's Exhibit 205, in evidnece.

MR. BERGEN: No objection, your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 205 received in evidence.)

Q Mr. Zucker, does Plaintiff's Exhibit 205 represent your best projection of what would have been the future earnings of the third song which John Lebnon failed to record?

A Yes.

Q And this is based on your experience with four other songs owned by Big Seven?

A That is correct.

Q How many years does this projection cover, Mr. Zucker?

A I believe from the four past exhibits about ten years, the period of time covers almost ten years.

Q That would not be the full life of the copyright then?

A Of course not.

Q Why did you limit it to ten years?

A Ten years is all we have available to us.

Q In terms of past experience?

A That is correct.

Q But theoretically it can go on for the life of the copyright?

A Yes, it could.

Q The remainder of the twenty-eight years?

A Correct.

Q And it could go on for the life of the renewal of the copyright?

A Yes, sir.

Q Which is another twenty-eight years?

A Yes, sir.

Q Let me move onto another area. Mr. Zucker, at this time I would like to call to your attention Plaintiffs' Exhibit 11, which is a transcript of a settlement which was arrived at in open court before Judge Griesa in October, 1973. Are you familiar with that?

A Somewhat.

Q Let me call to your attention what we have been referring to as the second part of the settlement:

"John Lennon will use his best efforts to cause Apple, which is a composite of various corporations, to license to Big Seven three songs from the Apple non-Beatle catalog currently in circulation, excluding only those songs composed by John Lennon and Yoko Ono Lennon together with those songs composed by Paul McCartney and Linda McCartney together, to the extent that any of those songs can be in any manner considered to be an Apple non-Beatle product."

Then I refer to your attention a statement made by Mr. Graham on the record. This is also part of Plaintiffs' Exhibit 11, where he said, "Yes, and that these licenses will be made to Big Seven at Big Seven's customary rates, whatever they may be at the current time, and with such advances which are in current practice which I understand to be a nominal advance."

Now, did I ask you to make a study of what Big Seven's customary rates were at the time in question?

A Yes, sir.

Q Did you make such a study?

A Yes, I did.

THE COURT: What does this relate to?

MR. SCHURTMAN: Your Honor,as you recall, the settlement was in two parts. The first part was that Lennon had to record three Big Seven songs. He failed to record one of those songs, and we have been giving you our claims for damages based on his failure to record one of those three songs.

Our claim is broken down very roughly, first of all, to the actual mechanical royalties for domestic and foreign.

THE COURT: But, the second phase I have already told you, I don't think there is even any argument about that. Maybe my memory is wrong, but I covered this before.

MR. BERGEN: You did, on February 27. You told Mr. Kander that you did not believe that plaintiff could claim any damages for that because they rejected it.

THE COURT: Didn't Marshall, Bratter,

write a letter?

MR. BERGEN: Yes, on December 31.

THE COURT: That letter was written on behalf of Mr. Lennon?

MR. BERGEN: Yes, your Honor. You recall that it was written on the 31st, because Mr. Lennon signed the Beatle settlement agreement on the 29th of December, and that gave him the right to offer these masters.

MR. SCHURTMAN: Your Honor, we have several points with respect to that letter. In the first place, the letter was untimely and too late. The license was supposed to be completed by the end of December.

THE COURT: Look --

MR. SCHURTMAN: I have to make my point.

THE COURT: This is completely unreal.

MR. SCHURTMAN: In this case I will make an offer of proof. I offer to prove the following:

The letter of December 31, 1974, which purported to offer a license to Big Seven pursuant to the original settlement agreement was untimely.

THE COURT: Why was it untimely?

MR. SCHURTMAN: Because the agreement provided that the license had to be made before December 31, 1974. They didn't even begin to make the initial offer until

December 31, so that it was received and could not have been received until January.

Now, this was only an initial negotiating proposal; it was not an actual license offer.

THE COURT: That had nothing whatever to do with Mr. Levy's rejection of that.

MR. SCHURTMAN: Mr. Levy didnot reject it. What he did, he wrote a letter, as you know, on January 9, 1975, claiming that the settlement agreement had been superseded by the subsequent 1974 agreement with Lennon. The matter was then left in abeyance until your Honor made a finding that the first settlement agreement had not been abrogated.

At this time we will either ask the Court to direct that Mr. Lennon or Apple, or both, comply with the second part of the settlement agreement. We are still prepared to work out an appropriate license on those three masters. We just could not do it at the time, because it was our view that the agreement had been superseded. But since your Honor has now made a finding to the contrary, we ask the Court to direct specific performance on this portion of the settlement agreement.

In the alternative, if we cannot get specific performance, then we would wish to prove what damages

flowed from the fact that we didn't get these three masters. One or the other.

THE COURT: Well, I would like to see some statemanlike offer of performance. I don't see any damages. I read my transcript of February 27, and I was pretty strong about no damages on Phase 2, and I still feel that way.

I will tell you, let's do this: You can make your offer of proof as far as damages. I don't think you have to make an offer of proof. You have your records. You want to try to put in relevant proof about damages under Phase 2. And I am saying to you that I am convinced on the present record that regardless of what you might put in as far as damage proof, there would be nothing that I can make any award on, because I am convinced that regardless of the minor discrepancy in timing, or any other technical problems, there was an offer of substantial performance on the 31st on behalf of Lennon, that it is clear that Lennon was ready, willing and able, and, in any event, that the reason that they didn't go forward is because Mr. Levy was taking the position that the old settlement was out the window and he had a new deal. So if you need any more specific offers of proof, you can certainly make your record.

MR. SCHURTMAN: Your Honor, as I said, the plaintiffs are prepared, and, in fact, urge the Court to direct specific performance of the second half of the settlement.

THE COURT: What about that?

MR. BERGEN: Your Honor, our position that we put on the record is that, one, Mr. Levy rejected that when it was offered to him. It may not have been sent out until the 31st of December, but what Mr. Schurtman said about a negotiating letter, the letter speaks for itself, there was an offer of three of seven masters.

Secondly, as your Honor is aware, we moved to dismiss this claim on the grounds that they had really waived their right to raise it again and were estopped from raising it. I assume that your Honor has not issued any formal ruling on it, but since we are going ahead, I will assume, at least for the time being, that that motion has not been granted.

As far as offering these songs, if I could overnight think about it, about our basic position, one, that he rejected it, and, further, he estopped from raising this issue --

THE COURT: I don't want to cross over any bridges. I rejected the damage claim. Now, as far as

there being any right to specific performance, I don't know, and I don't know what Mr. Lennon's posture would be on voluntarily carrying out the rest of the agreement. I just think we better hold that in abeyance.

MR. SCHURTMAN: May I make this suggestion to cut through this? In the first place, let me correct one minor point. Mr. Lennon does not really have to perform personally under the second phase, because he is not being asked to record any songs.

MR. BERGEN: That is right, he does not have to do anything.

MR. SCHURTMAN: It would simply be a license agreement of certain masters, which then would be used by Big Seven or one of its assignees. It is just paper-work. I just want to make sure there is no misunderstanding on that point.

Now, on the second part, I would suggest this: If Mr. Bergen could advise your Honor whether Mr. Lennon would be prepared to accept specific performance on this point if your Honor should decide there is no judicial estoppel, that the thing was not rejected out of hand and cannot be reinstated, and that Mr. Lennon should comply with the settlement agreement, if Mr. Bergen could tell us, "Yes, Mr. Lennon will," or "Mr. Lennon will not agree

to specific performance," then in the alternative your Honor can either direct specific performance or let us prove damages.

THE COURT: I don't want to speak for Mr. Bergen, but I will speak for myself. If we are going to have a voluntary act here, that is, settlement --

MR. SCHURTMAN: No.

THE COURT: Yes, it is.

MR. SCHURTMAN: I am not asking for voluntary; I am asking the Court to direct enforcement of a settlement agreement which was arrived at in open court.

THE COURT: I thought you suggested -- maybe it was I who suggested --

MR. SCHURTMAN: I think you may have. No, we are not asking for a voluntary act here; we are asking for a direction from the Court.

Now, I agree, first you have to decide the legal issue of whether we have any claim to enforce the settlement agreement. We claim that we do and that the estoppel argument does not hold water. Once you have made the finding, as you did, that the settlement agreement was not abrogated, and once their witnesses have admitted that the settlement agreement was still in force, as Mr. Seider and Mr. Lennon did, you have got to

enforce it.

THE COURT: It may be that at this juncture in the litigation Lennon would have no objection to voluntarily reactivating the come-together settlement and licensing the non-Beatle songs to Big Seven, or whatever that provision was. Now, if this were the case, it would dispose of these knotty problems potentially about specific performance and me ordering this and so forth, and potentially it might mean some good-sized profits to Mr. Levy. I would hope so. And everybody concerned.

Now, if that is to be done, maybe that could point some glimmer to getting rid of at least part of this case. Maybe there can be a cancellation of some mutual claims if there is enough profit in it from a voluntary business relationship. I don't know. I think that is one phase of the case where we have something live here that might have to be dealt with.

There was a settlement and there were obligations, and one would hope that when all is said and done, people honor their obligations. And so I think it is worth thinking about. It seems to me it is worth thinking about in a broader context. You look startled. It is not settlement if I slam Lennon with an order saying,

"Issue the licenses." But if Lennon and his lawyer believe that they are willing to perform, whether you call it an obligation or not, it relieves by that much the need for orders or decisions. So think about it, and as in our previous efforts to settle, nothing came out of it. But, you know, one always keeps hoping. Let us use this time to get your evidence in. The Phase 2 of the settlement is not worth talking about at the moment. I am not going to hear any evidence on damages. You can just assume that you have your record, you can put in everything and anything, and I won't preclude it.

MR. SCHURTMAN: I will have to make a formal offer of proof, I suppose. I don't see how it is reviewable unless I make it.

THE COURT: I don't deny that you might not have some damages. I am saying that the whole subject is precluded. You have got your record.

MR. SCHURTMAN: All right. May I call one thing to your Honor's attention for the record, because it is an exhibit that is in evidence, Defendants' Exhibit CE, which is the resolution that was annexed to the Beatle settlement of December 31, 1974. Do you recall that?

THE COURT: I recall the settlement agreement.

MR. SCHURTMAN: When the Beatles worked out a

settlement agreement, the settlement agreement contained a resolution authorizing Apple to go ahead and license these masters to Mr. Levy, and it was on the basis of that that Marshall, Bratter, wrote their letter.

THE COURT: All of the materials about that I assume you have, and I am precluding that and you have got your record. Now, let us go back to Phase 1. Get the damage proof --

MR. SCHURTMAN: Your Honor, this is not evidence as to damages; this is evidence to show you why specific performance should be directed, because you have pointed out that the letter of December 31, 1974 was an offer.

THE COURT: Is that in evidence?

MR. SCHURTMAN: I believe it is. If it is not, I offer it. It is Defendant's Exhibit CE.

THE COURT: And CE was or is the Beatle settlement agreement?

MR. SCHURTMAN: Yes, it is a resolution.

THE COURT: You want it deemed marked?

MR. SCHURTMAN: Yes.

THE COURT: Any objection to that?

MR. BERGEN: No.

THE COURT: You find the exhibit. So give it to me and we will make it part of CE, or something

like that.

MR. SCHURTMAN: I think it is CE.

MR. BERGEN: Since you raised the subject of this compliance, I would just like to get on the record and make your Honor aware that the seven master recordings that were offered in that December 31 letter were major records by each one of these artists. I am trying to show that Mr. Lennon, when he made the offer of these seven, was making a good faith effort because each one of these seven songs were really smash hits as single records. For example, a record called Those Were The Days, by Mary Hopkin, a record by James Taylor, Carolina On My Mind. They were major.

MR. SCHURTMAN: The only point I want to call to your Honor's attention on that last Exhibit DE is that the resolution provided that the licenses were to be made at 2 cents. The settlement agreement that your Honor had approved sais at Big Seven customary rates, and I am prepared to prove through Mr. Zucker, the witness who has prepared the schedules, that Big Seven customary rates were way below 2 cents, so that my point is that the letter of December 31, which didn't even mention the rate, was obviously just an opening proposal because then the parties would have had to agree on the rate.

THE COURT: But they could have negotiated if the door hadn't been slammed. Let's not go into that. What other proof do you have about this other thing?

MR. SCHURTMAN: The only other proof I would have is proof of actual damage for phase 2 of the agreement, which your Honor has ruled out.

THE COURT: Do you have any other proof of damages about phase 1 of the agreement?

MR. SCHURTMAN: No.

THE COURT: So you rest your case?

MR. SCHURTMAN: No, I don't. I am sorry, I thought you meant with Mr. Zucker.

THE COURT: You have no further questions?

MR. SCHURTMAN: I have no further questions of Mr. Zucker.

MR. BERGEN: Maybe this would be a good time to break. I can probably only go for a few minutes anyhow because Mr. Strauss has to leave. The second point is that we have had no discovery about this phase of the case, and I think the cross-examination would go a lot quicker if I had the evening to go through it, rather than starting.

THE COURT: I know we have this holiday. Is it agreeable to adjourn now?

MR. SCHURTMAN: I would like to continue with Mr. Zucker, if I may. I have already brought him back three times and I would like to finish with him.

MR. BERGEN: I am not going to finish with him

today, clearly.

THE COURT: What is the situation on the religious holidays? Who has to be where?

MR. BERGEN: Mr. Strauss told me that he had to leave between 3:30 and 4:00. Tomorrow we can be back here as early as your Honor wants to sit.

MR. SCHURTMAN: Mr. Strauss is not testifying this afternoon, Mr. Zucker is.

MR. BERGEN: Mr. Strauss is the CPA who we have retained for the purposes of this case. He has gone through the Big Seven records. He spent time over there one day.

THE COURT: Mr. Zucker, what is your situation?

THE WITNESS: I am available tomorrow.

THE COURT: I have assumed that we have a little early adjournment. We haven't taken a recess. We have to take a recess now. I will adjourn now until 10 o'clock tomorrow.

MR. SCHURTMAN: Your Honor, we have either two or three witnesses coming in tomorrow. These are not witnesses under our control. We thought there would be time for them. May we call them in the morning as they arrive?

THE COURT: Any problem?

MR. BERGEN: No.

THE COURT: Of course not. You do whatever is convenient.

Then Mr. Zucker will govern his schedule accordingly.

(Trial adjourned to Thursday, April 15, 1976, at 10:00 a.m.)

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BIG SEVEN MUSIC CORPORATION, et al,

- v s -

JOHN LENNON, et al.

April 15, 1976

[10:15 a.m.]

- - -

THE COURT: All right, Mr. Schurtman.

MR. SCHURTMAN: May I call Mr. Fred Bienstock as my next witness.

F R E D B I E N S T O C K , witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Bienstock, the acoustics in this courtroom are not very good, so please try to keep your voice up so everyone can hear you.

THE COURT: I didn't get the spelling of your last name.

THE WITNESS: B-i-e-n-s-t-o-c-k.

THE COURT: Thank you very much.

Q Where do you reside, Mr. Bienstock?

A I reside at 1111 Park Avenue, New York, New York.

Q What is your occupation?

A I am a music publisher.

Q What does that mean, music publisher?

A Well, what it means is an ownership in copyrights that we own and administer. In other words, I own a body of copyrights.

Q Are you connected with a company?

A Yes, I own a company in the States with partners called Hudson Bay Music, and I own a company in England called Carlin Music.

Q How do you spell that?

A C-a-r-l-i-n.

THE COURT: What is the name of the company in the United States?

THE WITNESS: Hudson Bay Music Company is one of them, which is my company, and there is a Yellow Dog Music, which is an ASCAP company.

Q But Hudson Bay Music Company is one of your companies in the United States?

A Right.

THE COURT: And Carlin is your English company?

THE WITNESS: Yes.

THE COURT: Go ahead, Mr. Schurtman.

Q Do your companies own musical copyrights?

A Yes.

Q Do you own copyrights in any particular fields of music?

A Primarily in the pop field of music.

Q Would that include rock and roll?

A Yes.

Q Do your companies have substantial catalogs in both fields?

A Yes.

Q Can you give the Court an idea of the gross revenues or sales of your companies on an annual basis?

A Well, I would think that in the United States in all of the companies we do a publisher's share after payment of royalties to writers of close to a million dollars a year. In England our gross income would be about two and a half million dollars a year.

THE COURT: It is on a different basis there? When you say gross, is that not after royalties?

THE WITNESS: That is not after royalties. The reason why I said it, because I don't remember exactly what the ratio of royalties are to the gross income.

Q How long have you been in the music business, Mr. Bienstock?

A I have been in the music business for thirty

years.

Q Can you tell the Court very briefly what positions you have held in the music business and what type of work you have done?

A I first worked for Chapel & Company, which was the biggest publishing company at that time, starting in the stockroom, then being promoted, eventually became a song plugger. And then I joined Hill & Range Music.

Q Who is Hill & Range?

A This was a company which was owned by cousins of mine where I eventually became a vice president and left to go into my own business ten years ago.

Q Do your companies do business with Morris Levy, Big Seven Music Publishing, or Adam VIII?

A Not directly with Big Seven, but with Roulette Records occasionally.

Q In other words, you license copyrights to Roulette?

A Yes.

Q Do your companies also do business with Capitol Records?

A Yes, on the same basis.

Q You license copyrights to Capitol Records?

A Yes, we do.

Q Can you give the Court an idea of whom you do more business with? Capitol or Levy's companies?

A We do a lot more business with Capitol than with Roulette.

Q Mr. Bienstock, are you familiar with the expression "cover record?"

A Yes.

Q Is that a term used in your industry?

A Yes, it is.

Q Can you tell the Cour what your understanding of a cover record is?

A A cover record is a record that is released subsequent to the first recording of a song.

Q When you have a situation where a song has been recorded and then at some subsequent point a well known artist re-records that song, have you had any such experiences in your business?

A Yes, we have many times.

Q Can you tell the Court what impact on your subsequent revenues results from the fact that a well-known artist has re-recorded one of your copyrighted songs?

A The revenues of the song will tend to go up dramatically in proportion to the importance of the artist involved.

Q Why is that?

A I would think one of the major reasons is that the song has a great deal of additional exposure, and other artists, who are constantly looking for songs to record, particularly in the case where it is an important artist, he listens to all of the recordings, and are likely to pick that song up subsequently, which may have been totally unfamiliar to them before, and record it themselves. So that it kind of compounds the activity of the song.

Q Can you give us a specific illustration from your own experience?

A We have had a number of songs in our catalog for a substantial amount of years and would get a recording by a considered important artist. An example that comes to mind would be a song called Close to You, which we had for maybe seven years and which earned on the average of $1,500 a year rather steadily. The Carpenters recorded it, and since then the income has increase dramatically, and an enormous amount of cover recordings merged out of it, which now, of course, enhances the value of the copyright enormously.

Q Who are the Carpenters?

A The Carpenters are a group that records for

A & M, a brother and a sister.

Q Is it a popular music group?

A Yes.

Q How would you rate the Carpenters in terms of popularity with John Lennon?

A Well, I mean, John Lennon is unique as an artist and has wide international acceptance, whereas the Carpenters are big in the United States and I don't think practically anywhere else.

Q Did I ask you to get me a set of figures showing what happened to the song Close to You before and after it was re-recorded by the Carpenters?

A Yes.

Q I show you Plaintiffs' Exhibit 451 and ask you if these figures were prepared by you or under your direction.

A Yes, they were.

Q Could I ask you to explain to the Court briefly what these various sheets in Plaintiffs' Exhibit 451 for identification reflect, starting with the first page?

A Well, they reflect the income of the song on a half yearly basis for 1963, from the second half of 1963, all the way to the second half of 1969, and includes the mechanical and foreign income. The total is all the

way on the right-hand column. So it is in round numbers. It shows that song earned $1,700 the first year or thereabouts, and then does an average of maybe $1,500 to $2,000 a year. Now, the Carpenters recorded the song --

THE COURT: Was there one person who recorded it at first?

THE WITNESS: Yes.

THE COURT: Who was that?

THE WITNESS: I don't remember who the original recording was by.

THE COURT: Not as prominent as the Carpenters?

THE WITNESS: No.

THE COURT: Go ahead.

THE WITNESS: The Carpenters recorded it in 1970 in an album first, and then the income went up rather dramatically, so you see now that the song earns approximately $50,000 a year since then, actually, in excess of $50,000 on the average.

Q Turning to the next page, what do the next two pages reflect -- the next three pages?

A Starting with the Carpenters it shows the cover recordings subsequent to the Carpenters recording of the song and cover records.

Q Is this particular sheet illustrative of

the experiences you have had in your own music publishing company?

A Yes.

MR. SCHURTMAN: I offer it in evidence.

THE COURT: Any objection?

MR. BERGEN: No objection.

THE COURT: Received.

[Plaintiffs' Exhibit 451 received in evidence.]

Q Mr. Bienstock, in your experience have you ever had the situation where a song was rerecorded by prominent artists where earning subsequent revenues did not increase materially?

A No.

Q Let me pose a set of facts to you and simply accept them as given as a set of facts. I am not asking you whether they are true or not.

You have a situation where John Lennon is obligated to record a song whose copyright is owned by the Big Seven Music Corporation. Mr. Lennon failed to record that song. If Mr. Lennon had recorded the song, based on your experience, would that have enhanced the value of the copyright over and above the mechanical royalties that Mr. Lennon would have to pay anyway?

A Yes, absolutely.

Q And would it have enhanced the value of the copyright in the manner that you have just described with respect to your Carpenters experience?

A Yes.

Q I believe you have testified that Mr. Lennon is much more prominent than the Carpenters, so would that have caused an even greater enhancement of the value of the copyright?

A It could have, yes.

Q Incidentally, when we speak of the enhancement of the value of the copyright, would that be over the entire life of the copyright? At what point does the enhancement cease, if at all?

A Well, as we saw in the Carpenters' situation, it is difficult to foretell at what point the curve would go down, but it certainly is a fact that the earnings would be vastly increased and will remain that way for a considerable length of time, and may very well remain the same for the term of the copyright.

Q Getting back to my set of facts about the song that Mr. Lennon did not record, there has been testimony by an agent connected with Big Seven that based on Big Seven's experience, he would estimate that the enhancement of the earnings of the copyright if Lennon had recorded the song would have ranged from $96,500 to $179,000 over the next few years. Based on your experience, would you say that that is a reasonable estimate?

MR. BERGEN: Objection, your Honor. How can this witness testify as to what --

THE COURT: Overruled.

A I would think it is entirely possible that those figures could have been achieved and possibly exceeded.

Q In your view --

THE COURT: What are the figures again?

MR. SCHURTMAN: The figures are based on Plaintiff's Exhibit 205.

THE COURT: Give me them again.

MR. SCHURTMAN: $96,500 on the low side, and $179,000 on the high side.

THE COURT: These were Mr. Zucker's estimates?

MR. SCHURTMAN: Yes.

Q Would you say these estimates are reasonable based on your experience?

A Yes.

THE COURT: I want to be clear what you are talking about. Are you using the term of enhancement of the copyright, or what is the term?

MR. SCHURTMAN: I am speaking merely of an increase in future earnings.

THE COURT: Over and above what?

MR. SCHURTMAN: Over and above the mechanical royalties paid by Lennon in any event.

THE COURT: So that $96,500 does not include the actual royalties which would be paid?

MR. SCHURTMAN: I will let Mr. Zucker explain that, but my understanding is that it doesn't.

MR. BERGEN: My understanding is that it does, and that is what the schedules show.

MR. SCHURTMAN: I have just checked with Mr. Zucker, and that would include the mechanical royalties, yes. It's the total figure.

THE COURT: In other words, if Capitol had recorded this on Walls and Bridges, Capitol of course would have owed Mr. Levy's company mechanical royalties?

MR. SCHURTMAN: Right.

THE COURT: And that is one element again that you claim?

MR. SCHURTMAN: Right, that is just a straight-forward mathematical computation.

THE COURT: Based on the actual sales?

MR. SCHURTMAN: Yes.

THE COURT: In addition to that, you are talking about all the other types of income that Mr. Levy might get from mechanical royalties on other recordings?

MR. SCHURTMAN: Performance royalties.

THE COURT: Performance royalties and so forth?

MR. SCHURTMAN: That is right.

THE COURT: I know what the Zucker figures include now. What is that exhibit?

MR. SCHURTMAN: The Zucker figures are summarized

in Plaintiff's Exhibit 205.

I should point out, your Honor, that the $179,000 that Mr. Zucker projected wasn't really a projection. It was the actual earnings after Santana rerecorded Oye Como Va, and there has been testimony that Santana is not as popular an artist as Mr. Lennon.

THE COURT: I was distracted and I apologize. What is the exhibit which shows the $96,000?

MR. SCHURTMAN: Plaintiff's Exhibit 205, your Honor.

THE COURT: Can I see that?

MR. SCHURTMAN: Yes.

MR. BERGEN: Can we have on the record that the $179,000 includes the mechanical royalties from the Santana recording?

MR. SCHURTMAN: Yes, I conceded that.

MR. BERGEN: There has been no testimony as to what that was.

MR. SCHURTMAN: It is in the exhibit.

MR. BERGEN: No, it isn't.

THE COURT: Let's take it one step at a time. May I just interrupt your testimony, Mr. Bienstock, so I know what we are talking about.

THE WITNESS: Surely.

THE COURT: Exhibit 205 has the end figures from these other exhibits that give the detailed earnings of Oye Como Va and three other songs, right?

MR. SCHURTMAN: That is right.

THE COURT: Let's focus on the Oye Como Va because you have used the same method with each, right?

MR. SCHURTMAN: That is correct.

THE COURT: Oye Como Va has $179,000 and the $179,000 is based on this Exhibit 201, and Exhibit 201 has all the mechanical royalties. I don't know whether this is useful, but I guess these mechanical royalties would actually be composed of two basic types of items. One would be the mechanical royalties received from the company who did the Santana record. It would be like receiving the royalties from Capitol who did the Lennon recording?

MR. SCHURTMAN: That is right.

THE COURT: And then presumably you are trying to illustrate that these mechanical royalties also included royalties on records by other people besides Santana, right?

MR. SCHURTMAN: Right.

THE COURT: So those two categories of royalties are involved?

MR. SCHURTMAN: Yes.

THE COURT: You haven't broken it down that way

in 201, have you?

MR. SCHURTMAN: I would have to ask Mr. Zucker.

MR. BERGEN: That is the whole point. It isn't broken down. So the 50 percent of the $179,000 figure could be the royalties from the Santana recording which was also a single, which would mean that the $179,000 figure is not $179,000 for so-called enhancement. It is 50 percent of $179,000 and the other 50 percent is for the Santana recording, which is the same as the Lennon recording.

THE COURT: We don't know.

MR. BERGEN: We don't know and they haven't broken it down.

MR. SCHURTMAN: Except we do know what the royalties are in the case of Lennon's recordings.

THE COURT: Let's take it one step at a time. We will come back to this.

The other element in Exhibit 201 -- and again I am not going through all the other exhibits, although I guess I have them. I have Daddy's Home. But you have used the same method in all the underlying exhibits, right, Mr. Schurtman?

MR. SCHURTMAN: Yes, sir.

THE COURT: The other element in these detailed breakdowns would be the performance royalties, and we

described that yesterday.

MR. SCHURTMAN: Right.

THE COURT: I think earlier in Mr. Kahl's testimony and in your argument you talked about earnings from sheet music, and none of that, of course, is included here.

MR. SCHURTMAN: We are not claiming sheet music earnings on this. We think they would have been enhanced, but we have not furnished any figures on that, so that is not part of our claim.

THE COURT: All right.

MR. SCHURTMAN: But I would like to point out that on the performance royalties, your Honor, if I understand this exhibit correctly, and it is subject to correction by Mr. Zucker who prepared it, we have not in any other place claimed the performance royalties that we would have earned from Lennon's recordings, so we are not doubling up on that.

MR. BERGEN: Yes, they are, your Honor. They are doubling up because again in the performance section of Exhibit 201 they haven't broken out the performances applicable to the Santana recording.

THE COURT: What Mr. Schurtman is saying, though, is that on that point there is no duplication,

because on his first -- let's go back. Let's talk about elements of his claim to see whether there is duplication.

The first element of claim would be the loss of mechanical royalties because song number 3 was not on Walls and Bridges, and there wouldn't have been royalties at the rate of so many cents per 425,000, right?

MR. SCHURTMAN: Correct.

THE COURT: Or if we assumed that the next record was Rock and Roll, it would be a different number. But let's call that item number 1, and that is loss of mechanical royalties payable by Capitol.

MR. SCHURTMAN: Right.

THE COURT: You have got that broken out in Exhibit 301, and an alternative figure in Exhibit --

MR. SCHURTMAN: 302 actually has the total figures. May I give you the totals, your Honor, on that, so you will have them in front of you?

THE COURT: I should look at 302. I have 302 in front of me.

MR. SCHURTMAN: If you use Walls and Bridges as the next album, and that is for you to decide, of course, the total of domestic and foreign would be 30,053.

THE COURT: Mechanical royalties?

MR. SCHURTMAN: Yes, that is just the straight-

forward computation on Lennon. If you use Rock and Roll as the next album, then our exhibit shows 342,000 sales, which would be $23,712, domestic and foreign. I should point out one thing, that since your Honor has held in another phase of the case that Rock and Roll should be rated at 442,000, a question arises whether if you pick Rock and Roll you should base the mechanicals on 442 in order to avoid having Mr. Lennon or Capitol get a windfall. But I don't want to concede that it should be 442. You understand that.

THE COURT: I understand that. I will consider that.

The point Mr. Bergen is raising is this, and let's call the next thing item number 2 of the claim, and that would be loss of mechanical royalties from other recordings of the song besides the John Lennon recording, right?

MR. BERGEN: That is correct, your Honor.

THE COURT: Now, for that we look to exhibit -- well, there is no exhibit showing that.

MR. SCHURTMAN: Showing the actual loss, no.

THE COURT: Wait a minute. Let's go back.

You are asking me to find that element based on I guess a variety of pieces of evidence including Exhibit

205, right?

MR. SCHURTMAN: Yes.

THE COURT: Now, if I took 205 as being analogous cases, the problem, of course, is that on that particular item I don't have a breakdown of additional royalties over and above the royalties earned from the recording artist.

MR. SCHURTMAN: That is correct, your Honor. But what you could do with 205, if I may suggest it, is to deduct from the figures we have there whatever actual mechanical royalties you find for Lennon's third song, which we suggest would be either $24,000 or $30,000, depending on which album you pick.

THE COURT: I don't quite see that, because it seems to me that, to use a hated phrase and very tried, it's the apples and oranges comparison. It seems to me what I have to arrive at is a proportion. You are asking me to analogize with other songs. If I want to analogize with other songs, it seems to me I may have to, I don't know what this all will lead to, but I wouldn't want to try to draw analogies unless I could have the breakdown. I must be frank with you. It seems to me that I would want to know in those cases what was the relationship between the royalties from the Santana recording itself versus the

other royalties. Then I might be able to get an idea of the relationship.

MR. SCHURTMAN: Multiply, in effect.

THE COURT: Yes, the proportion. Otherwise I don't think I can use these.

The third item would be performance royalties. You are saying that you have not included performance royalties from the Lennon recording in your item number 1, so at least there is no duplication.

MR. SCHURTMAN: That is right.

On that one point I will consult with Mr. Zucker who has prepared the projections.

THE CORUT: Suppose, for instance, it turns out that 90 percent of the increased earnings comes from the single recording artist, Santana, or the Carpenters, or whatever -- and that is a big thing.

MR. SCHURTMAN: I understand your point, your Honor. I will follow up on it.

Q Mr. Bienstock, one last set of questions: Are you familiar with this artist that we have been referring to, named Santana?

A Yes.

Q What kind of artist is he?

A It is an artist who records for Columbia Records and has achieved a substantial popularity in the United States.

Q How would you rate Mr. Santana's popularity against John Lennon's popularity?

A Well, John Lennon is unique. Only a handful of artists ever achieved that kind of a platitude as John Lennon did and does.

Q Reference has also been made to an artist named Germane Jackson. Are you familiar with that artist?

A Yes.

Q What kind of an artist is Mr. Jackson?

A Mr. Jackson is a member of the Jackson Five, who records for Motown Records.

THE COURT: How do you spell that?

THE WITNESS: Motown.

As a group the Jackson Five were infinitely more popular than Germane Jackson as a single artist. The Jackson Five is a group who could not compare in

popularity to John Lennon.

Q One last question: Are you being paid any compensation or have you been offered any compensation for testifying today?

A No.

MR. SCHURTMAN: I have no further questions.

CROSS-EXAMINATION

BY MR. BERGEN:

Q Mr. Bienstock, this schedule that you prepared, Plaintiffs' Exhibit 451, with respect to the earnings after the Carpenters recording, including the Carpenters' release, that does include the other records that followed the Carpenters recording?

A It does.

Q With respect to Mr. Schurtman's hypothetical question about John Lennon recording a Big Seven song, would your testimony be the same if the Lennon recording was not a single, it was just included in an album?

A The possibility of a single coming out of an album exists and can, therefore, not be discounted. Close to You by the Carpenters was recorded first in an album and then came out as a single.

THE COURT: I didn't hear that.

[Question and answer read.]

Q I don't think you answered my question. I asked you, would your testimony be the same if the Lennon record were not a single.

MR. SCHURTMAN: He just answered your question.

MR. BERGEN: He didn't.

MR. SCHURTMAN: May we have the answer read back?

A It would be the same. You never know once an artist records the song whether it will not be released as a single. Now, as I said, in Close to You it was recorded first in an album and came out only as a single afterwards.

THE COURT: You mean the Carpenters recorded it on an album?

THE WITNESS: Yes.

THE COURT: The Carpenters put it on an album first?

THE WITNESS: Yes.

THE COURT: Then it was released as a single?

THE WITNESS: Yes.

Q Close to You was one of their big hits as a single, wasn't it?

A Yes.

Q How many copies did the single sell?

A I would think that the single did maybe a million or better.

Q Isn't it true that Close to You was included in a Carpenters' best of records, entitled The Singles?

A Yes.

Q How many records did that sell?

A The album?

Q Yes.

A I would think it sold many hundreds of thousands.

Q Wasn't it a million seller as an album?

A It could have been.

Q Do you know or don't you?

A I don't know as a fact.

Q Isn't it a fact that the Carpenters' version of Close to You was one of their biggest hits?

A Yes.

Q Doesn't the fact that the Carpenters version of Close to You was a single have tremendous impact on performance income?

A Yes.

Q And if a sing is not a single, isn't it true that there is not a significant amount of performance income then?

A That is correct.

THE COURT: Is that just for the convenience of the radio station?

THE WITNESS: Yes, an album track will not get played as consistently as a single version.

Q Assume again for the purposes of the question that Mr. Schurtman posed to you before that the Lennon recording of the Big Seven song was not a single, wouldn't that mean that the performance income would not increase markedly?

THE WITNESS: Would you rephrase it again?

[Question read.]

A True.

Q Isn't it also true that if the Lennon song was not a sing[illegible]hat there may be fewer artists recording it after?

A Yes.

THE COURT: Let me have that question and answer.

[Question and answer read.]

THE COURT: Why would that be? It would not get the radio play.

THE WITNESS: It would not have as wide an exposure, although artists who record songs really listen to an album of John Lennon to see whether there is

anything in it that they may want to do. Of course, their attention may be drawn to it more vividly with a single that is getting played a lot. But artists nowadays get themselves albums and go through all of the tracks of an important artist like Lennon to try and find songs that they can then record.

THE COURT: The possibility of these cover records depends on the exposure of the song to artists who would re-record it?

THE WITNESS: Right.

THE COURT: Your first answer to Mr. Bergen that if it was not on a single there would be fewer re-recordings.

THE WITNESS: There might be a few re-recordings, yes.

THE COURT: I want to know in light of all we have said in the last few minutes what your conclusion is.

THE WITNESS: My conclusion about that is that if John Lennon records a song in an album, that today where people really try and find songs to record because so much material is being recorded, there is no question that every top artist has the John Lennon album and has listened to it. Now, I would be very much surprised, although

the possibility exists, that they may not do so, in which case if they hear the single and that they might record it. But I would tell you that I think that every top artist who records himself has heard the last John Lennon album and could very well pick a song out of the album.

THE COURT: We will take a short recess.

[Recess.]

MR. BERGEN: May I have the last question and answer read?

[Question and answer read.]

BY MR. BERGEN:

Q It is also possible that those artists could very well not pick out a song from the John Lennon album and record it?

A Yes.

Q There is no way of really telling whether they will or won't?

A That is true.

Q Assume for the purposes of my question and Mr. Schurtman's question that there already was a single from this album, would that make it even less likely that other artists would record one of the other tracks on the album?

A No.

THE COURT: I don't understand your question.

MR. BERGEN: On Walls and Bridges there was a single, it was a big hit, Whatever Gets You Through the Night, and what I am trying to bring out, if there was a single it would be more likely they would record Whatever Gets You Through the Night, rather than some other track on the album.

A No, on the contrary.

THE COURT: I get from what you say that it depends on whether they have the album or don't have it, whether they like the song or they don't like it.

THE WITNESS: That is correct.

THE COURT: You said earlier that since John Lennon is a prominent artist they would tend to be familiar with that album or own it.

THE WITNESS: Right.

Q How long after, for the purposes of this example, a John Lennon record would other artists tend to record a song from that album?

A Well, the John Lennon record is the beginning. Now, after some other artists have recorded it, it becomes compounded, because another artist might hear two other versions of the John Lennon, and once you have a big artist like that, the income will increase and compound

itself by other artists recording, not necessarily John Lennon any more. It can go on ad infinitum.

Q Assume that the song that John Lennon recorded was a rock and roll standard that had been made a hit years before by somebody else, your testimony I believe was that other artists may be unfamiliar with the song?

A Yes.

Q If the other artists were familiar with it already, would the mere fact that John Lennon recorded it cause them to go out and record it?

A It is a very hypothetical question and I am not sure that I could give you the correct answer to that, because John Lennon's arrangement may be something or his version that would attract somebody else. I really could not tell you one way or the other definitely that that would be the case.

Q So your testimony is there is no way of really knowing?

A That is right.

THE COURT: We are dealing with a definite song. I know we have been over this fifteen times, but the terms of the settlement were that there was to be a recording of You Can't Catch Me and two others?

MR. BERGEN: Yes, and the two others were

Ya Ya and Angel Baby.

THE COURT: Well, you say were mentioned.

MR. BERGEN: They were referred to in the settlement, but Lennon was given the option in the settlement of recording two other songs.

THE COURT: Would they have to be of that same type or just any old two songs?

MR. SCHURTMAN: It could be any two songs, your Honor.

MR. BERGEN: They were supposed to be rock and roll songs because Lennon was going to include them on the Rock and Roll album.

MR. SCHURTMAN: There is nothing in the settlement that said that.

MR. BERGEN: I don't care what was in the settlement. I know what was the intention of the parties.

MR. SCHURTMAN: I know you don't care what was in the settlement. That is obvious. I care because that is what we are suing on.

THE COURT: Let's stick with this. If we are trying to determine the character of the songs that would be involved, I guess the most definite place for me to start would be with the ones that were referred to.

MR. SCHURTMAN: Perhaps we should talk about Angel Baby then.

THE COURT: Angel Baby, was that a rock and roll standard? Are you familiar with Angel Baby?

THE WITNESS: No.

MR. BERGEN: There is testimony in the record that

the original version by a group called Rosie and the Originals is considered a rock and roll standard, or a rock and roll classic.

THE COURT: Wasn't there reference by the people who testified at an earlier stage that Angel Baby was a very important rock and roll classic?

MR. BERGEN: I think Mr. March testified to that and I think Mr. Lennon testified to that. Not in this proceeding, I think in the original trial in January.

THE COURT: When was Angel Baby originally recorded and who did it? Can we get that?

MR. BERGEN: We have the song sheet, your Honor.

THE COURT: Okay.

MR. BERGEN: I believe Defendant's Exhibit 1 shows that the version by Rosie and the Originals, the license was November 1, 1960.

THE COURT: Is the song sheet in evidence?

MR. BERGEN: Yes, it is, your Honor.

THE COURT: Give it to me.

Let's see if I understand this. It was recorded by -- and you told me.

MR. BERGEN: Rosie and the Originals.

THE COURT: In 1960?

MR. BERGEN: I think the license is about the

fifth one down, November 1, 1960.

THE COURT: That was the first recording, is that right?

MR. BERGEN: I believe so, your Honor.

MR. SCHURTMAN: I don't have the exhibit in front of me.

THE COURT: Why don't you check this so we know what we are talking about.

MR. SCHURTMAN: Do you have an extra copy of that?

MR. BERGEN: No, it is your document. I don't have another copy.

THE COURT: Here you are. Check it.

Did you give me an earnings record for Angel Baby, Mr. Schurtman?

MR. SCHURTMAN: No, we didn't, your Honor. We didn't use Angel Baby as an illustration because Mr. Lennon didn't record it or we wouldn't show any cover records on that.

MR. BERGEN: We will introduce the earnings records of Ya Ya and Angel Baby.

THE COURT: What I have been wondering is this, Mr. Bienstock: If you have got a song which is already a hit, then how does that affect your judgment about whether a

rerecording by Lennon would affect its earning power thereafter?

THE WITNESS: I couldn't give you a correct answer on this.

THE COURT: Does it have an effect on what you have been talking about from the witness stand? Do you understand my question?

THE WITNESS: Your Honor, the point is, once John Lennon records a song, there is no question that the value of the song is greatly enhanced. The output possibilities are unlimited because it could follow a pattern that could be astronomical. Whether it would do that if it was a hit before or not, I coulnd't really tell you. It really depends on his interpretation, who might hear it after he has done it, and decides to do with it, and one could not really tell for certain as to what would happen with it. The one thing one can tell for certain is that once John Lennon has recorded it, it becomes an entirely different value to that song.

THE COURT: When you say entirely different, let's focus on that. We don't have the earnings records on Angel Baby. I guess Mr. Bergen does, but they are not in evidence right now. Anyway, let's say something is a hit and I get some of these other songs like -- Close To You

certainly wasn't a hit before the Carpenters, was it?

THE WITNESS: No.

THE COURT: It was poking along at less than 2000 a year, right?

THE WITNESS: Right.

THE COURT: The Carpenters come along and greatly increase the value, right?

THE WITNESS: Right.

THE COURT: Let's suppose you have something that we will call a hit, and I don't know exactly what that means, but you probably do. Let's assume Angel Baby was a hit.

THE WITNESS: Yes.

THE COURT: It was recorded in 1960. John Lennon comes along and records it in 1974.

THE WITNESS: Yes.

THE COURT: Does he impart a different value to it over above its prior hit value?

THE WITNESS: Yes.

THE COURT: Why does that happen?

THE WITNESS: Firstly, because of the mechanical income on his own recording. Secondly, due to the fact that John Lennon is an artist that has an international acceptance and chances are that there will be cover recordings that

could come from anywhere in the world.

THE COURT: Let's suppose this, and I guess it depends on the psychology of the artist, to some extent, right?

THE WITNESS: Yes.

THE COURT: All right. I am an artist and I am not John Lennon, right?

THE WITNESS: Right.

THE COURT: Now, I have been familiar with a hit for years called Angel Baby, right?

THE WITNESS: Not necessarily.

THE COURT: Wait a minute. Just follow me along. I am not really asking you questions yet, but just assuming that I am an artist, I hear the John Lennon recording of Angel Baby but I also know that this was a hit back in the sixties, it was a rock and roll classic. Now, I have to figure out whether I want to record it now that John Lennon has recorded it, in view of all these circumstances. Am I more or less likely to record it if it was already a hit back a few years ago than if it was just one of these sleepers like Close To You?

THE WITNESS: Well, the people who would tend to do a cover version are in the age category of twenty and thirty. In 1960 they were five years old possibly. They

may not even know the song. Rosie and the Originals is unknown to me and I have been in the business thirty years. I must mave missed Angel Baby somewhere along the line. But I do know that if John Lennon records an album, every dedicated and interested artist will have that album and will listen to it in the same was as John Lennon will listen to a Carly Simon album or he will listen naturally to a George Harrison album or a Presley album. The top artists listen to each other's work very conscientiously.

THE COURT: What are the considerations? Are you able to tell me what are the considerations that they will go through in deciding whether they want to record it themselves, make a cover record? What do they think about? Do you know that?

THE WITNESS: Well, I do think that when they go through an album that they think about the possibility of recording one of the tracks, certainly what hits them. Now, I know that various record producers who have complained to me and said, "Listen, we don't get songs from publishers per se," what I do is I listen to the new Carly Simon album and I look at the tracks and see whether one of them is suitable for Dusty Springfield, and that is the way it works today.

So once you have a top artist, the chances are

that you will get automatic covers.

THE COURT: What about if the music comes from a kind of vintage like rock and roll which was popular back in the fifties and the record is sort of being put out as sort of a nostalgic piece -- do you get me?

THE WITNESS: Yes.

THE COURT: What are the chances of cover records on that?

THE WITNESS: They are big. There are certain songs of the fifties or sixties that have maintained a certain standard, so you are aware of some of the big Coasters hits, some of the big Presley hits, because they have been played all along. There are other ones that were hits and then completely disappeared. But the ones that have been hits that have gone on over the years will be rerecorded in nostalgia and track covers, and there are track covers all the time, and it becomes really a compounding thing. Don't Be Cruel, which Elvis recorded -- as a point of example, Elvis Presley records the song in 1956, Don't Be Cruel. It was an enormous hit at that time. It sustained itself and everybody covered it, but at one point it was not the artist that covered the Presley version. He has heard the Billy Swan version and brought the song to mind and then he covered it because he has heard a cover version. So the

compounding of a song once recorded by a big artist is infinite.

THE COURT: Look, how does one know -- well, that is the wrong way to put it.

Let's suppose John Lennon puts out an album and it has -- what did Walls and Bridges have, how many tracks?

MR. BERGEN: It had I believe twelve tracks, your Honor.

THE COURT: Let's say it has twelve tracks. Would every one of those -- well, a better illustration would be just to take Lennon's Rock and Roll album. He put out an album, and you have heard about it, that had all these songs of the fifties. There were twelve or so.

MR. BERGEN: Fifteen, your Honor.

THE COURT: There were fifteen songs.

Would all those songs have the same potential for cover records, or would there be differences depending on the value of the song?

THE WITNESS: The value of each and every one would be enhanced by the John Lennon recording. Some of them could earn infinitely more than others, but the fact remains that once he records it, the value of the song has been enormously enhance.

THE COURT: But now to try to reach an estimate of relatively how much the value has been enhanced, whether it's in the infinitely more category or the infinitely less category, if we were sitting here ten years from now and we were analizing it on the basis of history, would we find that some had caught on and produced a lot of cover records, and some had produced much fewer cover records?

THE WITNESS: Yes.

THE COURT: Because some will be more attractive than others?

THE WITNESS: Absolutely.

THE COURT: How do you find out? Are there people who have judgments about what songs are likely to catch on or what songs are not?

THE WITNESS: No.

THE COURT: And you don't have a judgment? In other words, if you heard a group of songs, you couldn't predict which ones would earn a lot and which ones would earn a little, right?

THE WITNESS: No. If somebody could, they could get millions.

MR. BERGEN: As Mr. Lennon said, I think we would all be in Miami if somebody could predict that.

THE COURT: Okay.

Q Assuming the hypothetical that the Judge was posing to you, Mr. Bienstock, that you have a song like Angel Baby that was a rock and roll hit, and fourteen years later Mr. Lennon records it. How long after Mr. Lennon has recorded it would there possibly be cover records?

A I couldn't tell you.

Q And if another artist or artists records that song, taking again the example Angel Baby, a year or a year and a half ago, is there any way of knowing that they recorded it because John Lennon recorded it?

A Not for certain.

Q They could have recorded it because they hears the original version by Rosie and the Originals?

A It's possible.

Q You mentioned that one of the factors in the enhancement of the value is the mechanical income of the Lennon recording. If I told you that in the first year of the release of this Lennon album, the mechanical income was approximately $8500 and that in the first six months a recording by Santana of a different song earned mechanical income of $52,000 , which of those two songs would you think a copyright would be enhanced more of?

A $52,000.

THE COURT: Can we just pause? I don't know

where you are getting these figures.

MR. BERGEN: I am getting them from 201. Referring to Plaintiff's Exhibit 201, which shows for the six-month period ending June '71 the mechanicals, domestic mechanicals for Santana were $52,522.

THE COURT: That is the first year after recording?

MR. BERGEN: The first six months.

THE COURT: Just a second.

The other figure was what?

MR. BERGEN: $8500, which is 2 cents times the 425,000 that Walls and Bridges sold.

MR. SCHURTMAN: That is only domestic.

MR. BERGEN: That is all I am asking.

THE COURT: I am just confused as to the 85,000 --

MR. BERGEN: 8500.

THE COURT: Is there any document I have?

MR. BERGEN: You take 2 cents and multiply it times 425,000, you come out with 8500. Those are the domestic mechanical royalties for one of the domestic songs on the Walls and Bridges album.

THE COURT: Okay.

That was on the first year?

MR. BERGEN: Yes, your Honor. A little more than

a year, like fifteen months.

THE COURT: Rephrase your question.

Q Mr. Bienstock, assuming that you have one song that earns domestic mechanicals of $52,000 in six months, and another song that earns $8500 in domestic mechanicals in approximately a year to fifteen months, which song has enhanced the copyright more, or I should say, which song has had its copyright enhanced more?

A I would think that a copyright is enhanced by the artist who records it. Only it is immaterial how much Santana sold on its original recording.

Q It's immaterial?

A It is. I would have thought that there are more artists likely to listen to a John Lennon album than they are likely to listen to a Santana album.

Q Is there any way of placing a dollar figure on the enhancement of the copyright of a song when it's recorded by John Lennon?

A No.

THE COURT: You are simply saying that the question of whether the sales of an album are 425,000 or 550,000, that doesn't affect the number of artists necessarily who listen, because they are going to be a handful anyway?

THE WITNESS: Right.

Q But that would affect the number of performances. That would affect the performance income, wouldn't it?

A Yes.

Q And it would also, of course, obviously, there is an impact on the mechanical end of it because one is much higher than the other.

A Yes.

Q You defined a cover record as a record that is released subsequent to the first recording of a song. Taking Angel Baby as an example, after Rosie and the Originals recorded Angel Baby, according to your definition, every song after that is a cover record?

A Yes.

Q So that when John Lennon recorded it in 1974, that was a cover record?

A Yes.

Q Do you know on Plaintiff's Exhibit 451, this list of licenses for songs, or licenses for Close To You after the Carpenters, how many of those songs were recorded, or those licenses issued, in the first year after the Carpenters' recording?

A I couldn't tell you truly. But not all those pages. Those licenses still keep coming in.

Q Do you, Mr. Bienstock, in your role as a publisher, do you go out and try to get other artists to record a song like Close To You?

A No.

Q You don't?

A No.

Q You answered that in a way that I had the impression I hadn't phrased the question properly. Do you do anything in order to try to get other artists to record a song like Close To You?

A Yes, but not Close To You, because Close To You is already recorded so many ways, and it is known so well by now, that we no longer try and put an effort into getting another version on that particular song.

a.m.

Q But did you initially?

A Oh, yes.

Q Was it through your efforts that the Carpenters recorded Close to You?

A Not through mine, no.

Q Through somebody in your company?

A Yes.

Q After the Carpenters recorded it did you continue to try to get other artists to record Close to You?

A Yes.

Q There came a point because the song was so popular that you didn't have to do that any more?

A Correct.

Q Assume again that John Lennon has recorded a song that is owned by Big Seven and that in the year following the release of that recording by Mr. Lennon there had been only a few other licenses issued for that song, would that indicate to you that the value of that song copyright had not been enhanced by Mr. Lennon's recording it?

A If there were a few licenses issued and a John Lennon license was issued, it must have enhanced in value.

Q But didn't you testify before that there is really no way of knowing whether the artists who recorded

it after Lennon recorded it because he did it or because somebody else had done it?

A Yes, it is true.

Q Mr. Bienstock, I show you Defendants' Exhibit DR for identification, which has been identified as the song sheet for a song called Ya Ya that is owned by Big Seven. I direct your attention to the third page where it indicates a license to John Lennon, September, 1974, and another license farther down the page to Mr. Lennon for the same song in February, 1975.

With regard to the licenses issued following that, and I believe there are only two, Frankie Gee and a group called the Evaros, do you see from looking at that song sheet any cause and effect relationship between the recording by Mr. Lennon and the issuance of a license to these two other artists?

A Do I see any connection?

Q Yes.

A Well, I cannot say that they are the direct results of Mr. Lennon's recording. However, the likelihood exists that new licenses will still be coming in and chances are that they are more likely to be based on the fact that he had recorded them than whoever did it first. I say, it is possible.

Q Maybe? No way of really telling?

A I said before, the chances are more likely that there will be a result of Lennon having recorded them than having heard them in the original, whatever it was.

MR. BERGEN: I have no further questions.

REDIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Let me show you the song sheet, Plaintiffs' Exhibit DS, of You Can't Catch Me, which is a song that John Lennon did record and in the Rock and Roll album. If you will look at the song sheet you will see that after Lennon recorded it, another artist recorded the cover record, an artist named Steven Stills.

Are you familiar with Steven Stills?

A Yes, I am.

Q Is Mr. Stills a well-known artist?

A A very well known artist.

Q Would the fact that Mr. Stills has recorded after Lennon and has the value of the copyright in your opinion?

A Yes, it would.

Q Would that be the kind of compounding effect to which you referred in your previous testimony?

A Exactly.

Q And when I point out to you that the Rock and Roll album came out in February, 1975, and Mr. Stills recorded his cover record in January, 1976, is it likely in your estimation that as years go on there will be additional cover records?

A Yes.

Q You testified in response to a question by Mr. Bergen that when you are talking about a hyptothetical song, a song that was never recorded, you can't put a figure on what the future earnings would have been?

A Right.

Q Is it possible based on experience with other songs to make reasonable projections of such earnings would have been? Do you understand my question?

A No, I don't understand you.

Q Well, I have shown you, and, in fact, you have produced it yourself, certain calculations showing actual experience with other songs.

A Right.

Q Where a song was re-recorded by famous artists and then there were cover records and increased revenues.

A Yes.

Q Now, that was actual experience, because these people had, in fact, recorded the hit songs?

A Correct.

Q Based on that kind of experience is it possible to make reasonable projections of what would have happened if artists like Mr. Lennon had recorded a song the way it was supposed to have been recorded?

A Well, as I testified before, there is no question that the value of the song has been enhanced and that its earning potential over the years will reflect that it has been enhanced, its capital value as a copyright. Now, as to a dollar amount, nobody can predict it, because it could be enormous.

Q What you are saying is you cannot predict it with any degree of precision?

A Absolutely, but you know for a fact that once a big artist has recorded a song it goes to a higher plateau, a higher or lower platform. It can go infinitely higher, and then there are various degrees as to how the songs --

MR. BERGEN: Didn't you say higher or lower?

THE WITNESS: They will go from a certain platform. They will certainly have been enhanced in value.

Q Now, Plaintiffs' Exhibit 451 is your experienc e with the song Close to You?

A Yes.

Q That does not break out the earnings of the Carpenters. Is it possible to make such a breakout?

A I cannot do it from the figures here. But even granted that they did a million in the release album and another million in another album and a million in singles, you would be talking about three million, about $ 60,000. The song has been earning $50,000 to $60,000 a year. So I would think that the Carpenters' contribution to that income now, which is six or seven years after their version first came out, is insignificant.

THE COURT: You have got Exhibit 451. You have got total earnings after the Carpenters of $339,000.

THE WITNESS: Right.

THE COURT: And this is over a six-year period?

THE WITNESS: This is over a six-year period -- five-year period -- a little over five years.

THE COURT: Your estimate of the earnings from the Carpenter recording, is what?

THE WITNESS: Let's say four million --

THE COURT: Wait a minute. You say that their original album sold a million?

THE WITNESS: Yes.

THE COURT: And what else did they put out?

THE WITNESS: They put out an album The Best of the Carpenters.

THE COURT: Did that sell a million?

THE WITNESS: I would think it did.

THE COURT: Then there was a single?

THE WITNESS: Yes.

THE COURT: How many did it sell?

THE WITNESS: Another million.

THE COURT: So you have three million.

THE WITNESS: And maybe some albums did more -- let's say four million -- let's say they did five million.

THE COURT: Whatever the million, it was two cents per record?

THE WITNESS: Right.

THE COURT: Which means sixty thousand or whatever.

THE WITNESS: Or eighty or a hundred thousand.

MR. SCHURTMAN: That is over the five-year period.

THE WITNESS: Over the five-year period.

THE COURT: And that is out of total earnings of 339?

THE WITNESS: Right.

MR. BERGEN: Where do we get the figure of

339; I see a figure of 110,000.

THE COURT: The second page.

MR. BERGEN: I got the second page.

THE COURT: You are looking at the wrong column. 339 is total earnings, domestic and foreign.

MR. SCHURTMAN: I have no further questions of this witness.

MR. BERGEN: I have a question.

RECROSS-EXAMINATION

BY MR. BERGEN:

Q Mr. Bienstock, are you familiar with a group called the Rolling Stones?

A Yes.

Q Were the Rolling Stones a popular group in 1965?

A Yes.

Q Were they as popular as John Lennon?

A No.

Q If the Rolling Stones had recorded a song owned by Big Seven in 1965, would that have enhanced the copyright?

A Yes.

Q And assuming that there were only five cover records in the next five years of You Can't Catch Me or five licenses issued in the next five years, what would

that indicate as to the enhancement of the value of the copyright?

A That there was an enhancement.

Q But was it a significant enhancement?

A I could not tell who the licenses were issued to.

Q Well, let me tell you the name of the groups. The groups, according to Defendants' Exhibit DS, were the Blues Project, a group called Love Sculpture, and a group called the Bar Kays. Would that help to tell you whether it would be enhanced?

A It certainly would be enhanced. Two of the groups are well known. It certainly would have enhanced the song. Two of the groups involved, the Blues Project and the Bar Kays are well known. I don't know what their mechanical income was, but it certainly was enhanced.

THE COURT: What are the well known groups?

THE WITNESS: The well known groups are the Blues Project and the Bar Kays.

Q Mr. Bienstock, your estimate about three to five million units for Close to You by the Carpenters, is that domestic or worldwide?

A I don't know. I would take five million as a figure which may be top. I don't know. I don't think

they did five million combined.

MR. BERGEN: No further questions.

[Witness excused.]

MR. SCHURTMAN: I call Mr. Murray Deutsch as my next witness.

MR. BERGEN: I would like to register an objection for the record. Each of these witnesses are experts and we were never notified by the plaintiffs they were going to call experts; we never had an opportunity for discovery or anything.

THE COURT: Overruled.

M U R R A Y D E U T S C H , a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHURTMAN:

Q What is your residence?

A New York City.

Q Can you state your address for the record?

A 118 East 60th Street.

Q What is your occupation?

A I am president and chief executive officer of a music company called The New York Times Music Corporation.

Q Is that a subsidiary of the New York Times?

A Yes, it is.

Q What is the business of the New York Times Music Corporation?

A Publishing music.

Q Does the company own copyrights?

A Yes, it does.

Q Do you own copyrights in the popular music field?

A Yes, we do.

Q How long have you been in the music industry?

A Oh, approximately 30 years.

Q Can you name some of your current positions in the music industry?

A Well, I was the president of the company called United Artists Music Company, and before that I was the general manager of a company called Southern Music and Peer International.

Q Mr. Deutsch, are you familiar with the expression "Cover records"?

A Very much so.

Q Would you tell the Court what a cover record is?

A Well, in my definition, a cover record would

be any record recorded after the original recording.

Q If you have a situation where a song has been recorded and then a period of time thereafter it is re-recorded by a popular artist, by a well known artist, what effect does that re-recording by a well known artist have on the value and the earning capacity of the copyright?

A A dynamic effect for income and for the copyright.

Q Well, can you explain in a little more detail the nature of this effect? What causes the earning capacity to rise?

A Well, obviously if it is covered, for example, by a famous artist, the chances are that the mechanical income is going to be much better than it previously was.

Q Can you give the Court any illustrations from your own experience?

A I think I can. I can't do it in the present company I am representing, because we are comparatively a new company two years old. But I think I can when I was the president of United Artists Music.

I had a song called Delta Dawn that was written by Alex Harvey. When I took that song from Alex we got various records on it, but nothing ever came of it. And then Betty Midler did it.

THE COURT: Betty Midler recorded it?

THE WITNESS: She recorded the song, and at the time she was popular, but that is as far as it was; she did this in her act and then recorded the song, and the income was just fair. But because of her recording this song and her reputation from within the industry an artist by the name of Helen Reddy recorded it on Capitol Records.

THE COURT: How do you spell Reddy?

THE WITNESS: R-e-d-d-y. And that made it a No. 1 song domestically, and the foreign did very, very well, and from that day on when Helen Reddy did it, it is now a standard and there were many different versions around the world. In essence, what I am trying to say is because of a very big artist doing it, the copyright really grew.

Q Let me give you a brief hypothetical situation: If Mr. John Lennon were to record a song -- let us assume it is a classic rock and roll song which has been around for a number of years -- if he were to record it again in a current album, would that enhance the value of the copyright?

A As a musicman I would have to say yes, obviously it brings the song back to life; other artists and

record producers look at these things, and, obviously, they are going to record a proven song rather than a song that is not proven. I would say that it certainly does enhance the copyright.

THE COURT: May I have the last answer read?

[Answer read.]

Q When you say enhance the copyright, you mean in the sense that there will be other cover records, and, therefore, additional earnings?

A Yes, no doubt about it.

MR. SCHURTMAN: I have no further questions of this witness.

CROSS-EXAMINATION

BY MR. BERGEN:

Q Mr. Deutsch, with respect to the song Delta Dawn, who enhanced the copyright, the Betty Midler version or Helen Reddy's version?

A Well, it was the B side of Betty Midler's version.

Q Of a single?

A Yes.

Q So it was a single?

A It was also in her album.But I can bring it out a little more to you. She also did it in her act,

so I had two things going for me, I had her performance in her act and also on her single and in an an album, and the song got to be very well known and Helen Reddy did it because of that.

Q When you say in her act, is Betty Midler one who performs on a regular basis in theatres and on tours and night clubs?

A From what I gather, yes. I don't know much about her, except she is a very famous performer and she does concerts and she does theatres and she does records.

Q And all of that had an impact on the song?

A Definitely, as far as I am concerned.

Q You said that not much came of it? You said that the income was just fair after Betty Midler?

A No, I didn't say --

Q I believe you did.

A I said the income was fair.

Q With respect to Betty Midler?

A Yes, because, as I said, it was the B side of a single.

Q And the song really took off after Helen Reddy did it?

A Mechanically, yes.

Q So isn't it fair to say that Helen Reddy did

more to enhance the value than Betty Midler?

A Certainly.

Q Was the Helen Reddy version a single?

A And an album, yes.

Q In the question posed to you by Mr. Schurtman about John Lennon recording a song, if the Lennon recording was not a single would that enhance the value of the copyright?

A Definitely.

Q And if it were a single?

A Yes.

Q Would it enhance it as much in an album rather than with a single?

A Would you say that again?

Q In other words, if the song that John Lennon recorded was just one of fifteen tracks on an album, would that enhance the copyright less than if it was a single?

A Most important, regardless of whether it was a single or an album.

Q Being a single has nothing to do with it?

A You mean as far as earnings are concerned? Yes, as far as earnings, the bottom line, yes, but as far as the copyright value is concerned, it is very valuable, regardless of whether it is a single or an

album.

Q When you talk about earnings, you talk about performance or mechanical?

A If it is a single there would be performance money; there would not be performance money if it is an album.

Q Do you know how long ago Helen Reddy released her single of Delta Dawn?

A Well, I can't be that accurate. I am away from United Artists two years and got that record two years before that. That is '76; it is about five years ago, four years ago.

Q When you say you got the record, were you instrumental in getting Helen Reddy to record the song?

A Yes, I was. -- Let me elaborate -- myself and my staff, certainly.

Q What did you and your staff do to get Helen Reddy to record Delta Dawn?

A Just show her the song in a demo and it was approved by her producer, Thomas Catalano and her husband, Jeff Wald.

MR. BERGEN: No further questions.

MR. SCHURTMAN: I have two questions, your Honor.

REDIRECT EXAMINATION

BY MR. SCHURTMAN:

Q If John Lennon recorded an album is it likely that some of those songs will be released as singles?

A In the present business, the way it is going today, yes, I would think somewhere in the world -- I can't guarantee it -- but I will say whoever was the publisher, his duty would be to try to get it released somewhere in the world, and the chances would be very good to get it out.

Q Now, you gave us the illustration of where Betty Midler made the first cover record and then subsequently Helen Reddy made another cover record, and you said the effect of both of these things helped, except you say that Betty Midler also performs in night clubs.

A Yes.

Q Do you have any other illustrations -- and I don't want to go into a great detail -- of this type of compounding effect?

THE COURT: You really should have done this on your direct.

MR. SCHURTMAN: Only because Mr. Bergen brought out the fact that Betty Midler does night club performances and that might weaken the effect.

MR. BERGEN: That has nothing to do with bringing it out on direct.

THE COURT: I am sure we can go on and on with these illustrations.

MR. SCHURTMAN: I will simply ask him to give me one other illustration.

THE COURT: It seems to me it is the exposure. John Lennon could sing in a night club if he wants to.

MR. SCHURTMAN: It increases the exposure.

THE COURT: The different artists will do different things.

MR. SCHURTMAN: Fine.

THE COURT: We can't go into all variety of career patterns.

MR. SCHURTMAN: Nothing else.

THE COURT: You may step down.

[Witness excused.]

MR. SCHURTMAN: I call Mr. Weiser as my next witness.

N O R M A N W E I S E R , a witness called on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHURTMAN:

Q Where do you reside, Mr. Weiser?

A New YOrk City.

Q What is your occupation ?

A Music publisher.

Q What company are you connected with?

A Chappell Music Company.

Q Would you spell Chappell?

A C-h-a-p-p-e-l-l.

Q What is your position at Chappell?

A I am president of the United States company and I am a senior vice president of the worldwide company.

Q Is Chappell one of the largest music publishing companies in the world?

A It is the largest and it is the only worldwide self-contained company of its stature.

Q Does the Chappell Company own copyrights in the popular music field?

A Yes, it does.

Q Would that include rock and roll?

A Yes, it would.

Q Are you familiar with the expression "cover record?"

A Yes, I am.

Q Would you tell the Court your understanding of that?

A Any subsequent record from the initial release of the recorded song.

Q Let me give you the same hypothetical that I gave to Mr. Deutsch. If Mr. Lennon agreed to record a song whose copyright in this instance was owned by Big Seven Music Corporation and he failed to record the song, if he had recorded such a song, would that have enhanced the value and the earning capacity of the copyright over and above the mechanical royalties that Lennon himself would have made?

A Absolutely.

Q In what manner would it have enhanced it?

A It would serve to bring that song not only to the attention of the Lennon fans or buyers, but to hopefully, through our efforts, to any recording artist we felt could do the type of song, and many different versions, not just the way Lennon would do it.

Q Now, an accountant has given testimony that

if Mr. Lennon had recorded such a song it could have increased the earnings of the copyright by as much as $200,000.

MR. BERGEN: There is no such testimony. I object. We also showed that some portion of that goes for the mechanical royalties.

THE COURT: Mr. Schurtman's was a general question.

Q Let me use $150,000 as an illustration, Mr. Weiser.

A Hopefully in our case it would be more.

Q Based on your experience in the industry, will you say that if Mr. Lennon had recorded, say, an old rock and roll song which was a classic, that this could have increased the future earnings of that copyright over the next five years by as much as $150,000?

A I could not say for certainty, but it would be my considered judgment that it could have conceivably happened.

MR. SCHURTMAN: I have no further questions

CROSS-EXAMINATION

BY MR. BERGEN:

Q When you say you could not say for certainty, it is possible that it would not?

A Anything is possible in our business; it is

not probable, but it is possible.

Q Where do you get the figure of $150,000?

A From this gentleman. I said hopefully in our case it would be much more.

Q When you say hopefully in your case, you mean through your efforts, Chappell Music, to get other people to record it?

A Yes.

Q It is a factor?

A Yes.

Q It is a very important factor?

A Yes.

Q Would a publisher to go out and get other people to record it?

A With a Lennon cover we would definitely go to work on that song again. We would purchase records from the manufacturer of that version and use it as a demo with other artists, not just the United States, but worldwide. We would definitely go out to promote that song and expose it as widely and as strongly as we could.

Q Suppose the record was not released as a single, would that lessen the output of it?

A No, we would purchase the album, and we do it all the time, with artists of that stature.

Q How long after Mr. Lennon had recorded this song do you think other cover records would begin to appear?

A Are you speaking domestically?

Q Yes.

A Domestically we would work it for the next year.

Q And if I told you that Mr. Lennon --

THE COURT: What was the last question and answer?

[Question and answer read.]

THE COURT: When you say you would work it for the next year, what do you mean?

THE WITNESS: We have a staff of about fifteen men, located in Los Angeles, Nashville, New York and Toronto, and they would use that recording where they could show it to an agent they felt would be a potential user of that song in a new album, in a new single version, whatever.

Q Does that mean that most of the cover records would be within a year or is it just over a period of time greater than a year?

A Conceivably it would occur over a longer period of time, although we would not continue to work in that way much longer unless there was a great deal of activity.

THE COURT: If it was really something that was going to take on, when would you hope that the cover records would actually be made?

THE WITNESS: We would know within three to six months of the activity and there would be, I would assume, covers within that time.

THE COURT: Within --

THE WITNESS: Three to six months.

THE COURT: And if it didn't turn out, you would drop it?

THE WITNESS: No, with a Lennon record, with a record of a recording artist of that stature of any song, we would continue to use that. We work a little differently than these companies.

THE COURT: What do you mean "these companies"?

THE WITNESS: The publishers that I heard speak of this morning. Our people try to cast music for artists. In other words, where we know that an artist is doing a concept album, in other words, an album that has a story to it or an idea behind it or an overall picture, we would attempt to get our music into that concept album by casting it. One of the ways we do it is to show music that fits within that concept. A record by a John Lennon or a Paul McCartney or a Tom

Jones, or any superstar, would continue to be active in our files, our current files for use in this type of music or song promoting that we do.

Q But if the song were going to take off, the types of other artists recording it after Mr. Lennon recorded it, would do it in the first three to six months?

A I would assume so, that is, with our type of work.

Q Mr. Weiser, assume that John Lennon recorded a song, a rock and roll song in February of 1975, and since then there has been only one license issued.

THE COURT: What song is that?

MR. SCHURTMAN: You Can't Catch Me.

Q There had been only one license issued since then to date, in other words, over a year, would that indicate that that song was not going to take off?

A Not necessarily. You see, you are asking a very important question in our business, a very vital question in our business. But we are no t talking records now, we are talking copyrights. A record dies in eight weeks, ten weeks, twelve weeks; an album, if you are lucky, has a six-month cycle; a song has five, six years, and if you are a good publisher an d you know your business, t hat does not mean too much, that it

has not taken off yet. Secondly, and also of vital importance, is that the song could be recorded in Turkey and come back here as a hit. I am exaggerating. It could be recorded in London or Paris or in Amsterdam from that Lennon record. When you discuss Mr. Lennon, you are discussing an international superstar who has stature in any country in the world. I have seen Dutch acts, I have lived and worked in Europe for a year and a half in business, and I can tell you that acts all over the world go to the super star's record. We have standard music, like On a Clear Day, Richard Rodgers' music, Gershwin, Porter, Lerner and Lowe, we publish it or most of it, and I can tell you that if Tom Jones records On a Clear Day, I will get 25 records in the next year around the world, and I can show you our records to prove it.

Q I am talking about where there has only been one cover record that year.

A I said you don't know yet, because that song may have been covered in Holland, it is not here yet, it may have been covered in England and not released yet, it may have been covered in Japan and it is not released yet. First of all, we are two to three years behind in our foreign language and our foreign income, and we own our companies overseas and we don't know what happens

there that exactly --

MR. BERGEN: No further questions.

a.m. jqas Weiser - redirect

REDIRECT EXAMINATION

BY MR. SCHURTMAN:

Q The song that Mr. Bergen just referred to, where he said there has been only one cover record since Mr. Lennon recorded it, is a song named You Can't Catch Me. If I were to tell you that the cover record was recorded by Steven Stills, would it be your opinion that the song has taken off, the value of the copyright?

A The guy on my staff who got the cover record would have gotten a bonus.

Q Because he got Steven Stills as a cover?

A Yes, that is a major cover record. It could lead in turn to many other covers, because Stills' audiences are a bit different than Lennon's, and now you have exposed the song into another group of contemporary artists.

Q Could that have a compounding effect?

A It would have a cascading effect.

Q One last question. I want to clarify this business about working a record. When you say that you and your company would know whether a copyright will take off within three or six months after it has been rerecorded by popular artists, are you basing that on the fact that your fifteen-man staff would work it?

A Absolutely.

Q But if you have a publishing company like Big Seven which doesn't have your kind of staff, it could take years?

A It could take longer.

Q For that effect to take place?

A Yes.

THE COURT: What is it that causes the effect if the company isn't working to promote it?

THE WITNESS: Then the fact that a Lennon or a Stills records it or exposes it, it automatically exposes it to a segment of the contemporary scene and the other artists will see it. The taste of a Lennon is impeccable. He is a fantastic artist. He has a tremendous reputation with younger people in our industry, and I would absolutely believe that a record in his album would appeal to a great number of contemporary artists, just like in a Stills album it might come to the attention of a totally different segment of that contemporary recording scene. If it's a country artist, again it would come to another segment of our business.

Q Are you saying, Mr. Weiser, that this enhancing effect would take place even if the publisher doesn't send out a staff to promote it?

A I believe every cover record, every record you get enhances your copyright. There is absolutely no question.

MR. SCHURTMAN: No further questions.

THE COURT: Let me ask you something. I don't mean to keep you, but a company in the music publishing business, do they make most of their money out of actually publishing sheet music, or getting royalties from records?

THE WITNESS: Royalties from records, performances. There are very few publishers still in the sheet music business.

THE COURT: When you say you are a music publisher, do you publish sheet music?

THE WITNESS: Absolutely.

THE COURT: But a lot of the so-called publishers don't even publish, is that correct?

THE WITNESS: As a matter of fact, we would represent maybe forty to fifty other companies in that particular phase of music publishing.

THE COURT: Can you tell me, is the business organized so that the so-called music publishers get the copyrights? In other words, develop the artists or whatever? The record companies don't do that, is that right?

THE WITNESS: No, they both do it, but in today's music market the development of so-called writer/artists has become a way of life in the music publishers. However, it's not our only way of life because we still have a Richard

Rodgers, we still have Lerner & Lowe, and we still have Julie Stein. In the contemporary field we have a girl by the name of Carol Sagor.

THE COURT: When you say you have these people --

THE WITNESS: They are assigned to us. We represent them and we control their copyright.

THE COURT: But new writers.

THE WITNESS: Carol Sagor is a new writer. She is a young lady in her early, mid-twenties.

THE COURT: Your company is a company that will work with writers, right?

THE WITNESS: Absolutely. We are not in the record business.

THE COURT: The record businesses don't work with the writers so much?

THE WITNESS: Only where they have publishing companies of their own and most of the major record companies and many of the smaller ones do have subsidiary organizations which publish music. Not the way a Chappell publishes. They have copyrights, they work to an extent. When they sign artists, they sign them as recording artists and as writers to their publishing company. I have done that when I was in the record business, and it's a good business practice.

THE COURT: If you have someone like John Lennon who both sings and performs and also writes music, does he deal with a publishing company as far as his writing?

THE WITNESS: He would have his own publishing company.

THE COURT: He would have his own and they would own the copyrights?

THE WITNESS: I don't know if he does now, but he would as a partner when he was in the Beatles.

THE COURT: Getting away from John Lennon, if you have some somewhat lesser artist, he both performs and he writes his music, who would own the copyright?

THE WITNESS: I will explain it two ways. One, we have a company with Richard Rodgers, who has his own music publishing firm called Williamson Music. Incidentally, it was started many years ago by Chappell and eventually the owners of Chappell at that time gave him the company. We represent and administer that company. By that I mean we do all of his copyrighting work, we pay his royalties to himself and his other writers. We expose his copyrights to artists wherever possible, however possible. We have a separate contract with him that covers his printing, folio sheet music, band music, arrangements for orchestras, and so forth. That is what we call in our business an

administration deal.

Now, we also have a company with a group called the Ohio Planners, who are maybe not superstars worldwide, but certainly they are superstars in the United States. Their average sales are a million and a half albums. Singles are anywhere from 1 million to 2, 3 million. With them we have a joint venture. The members of the group, and there are four, five of them who write, are assigned to their music company. We have a joint venture with that company. It's a 50-50 deal.

THE COURT: The recording company?

THE WITNESS: The publishing only. They are a self contained unit. Anything they record is their own music or normally is their own music. Very seldom they use an outside outfit or song that we or another publisher would present to them. In this case we literally own half of the copyright and they own half of the copyright. We get a small fee for administering, or for doing all the work of the company. Roughly half of our overall it would be. If our overall overhead is 15 percent, we charge them half of that.

THE COURT: I was just curious. If you have not a John Lennon, not a great big superstar, but you have just got some more average artist, he both writes music and he performs, and he has got an exclusive recording contract

with, say, Columbia, will Columbia be the company that deals with his copyright on the music that he writes, or will he then go to a music publishing company to deal with the copyright, so he has a company that deals with his recordings, and he has a company that deals with his copyrights on what he writes. Do you understand my question?

THE WITNESS: Yes, I do. It happens both ways. If it's a comparatively new artist, if he wants that deal with Columbia records Records or RCA Records badly enough, and they can convince him to put his publishing into their company or make a 50-50 deal with their company, they will try to do that. If he has the proper -- not proper advice, if he has a good lawyer or good accountant, and I can assure you all of them do today, they will make a much better deal or they will retain the publishing outsider of the record company and come to somebody like Chappell who is not in the record business, and try to make a separate deal with us. Where we go out and find writers, we for example run workshops in New York and Chicago. There are ongoing projects. We have a workshop on 16th Street here and we have a workshop in the ghetto in Chicago with personnel there running them. We are looking for young writers constantly. When we sign one of those writers out of that workshop, or we find some young performer in the Bitter End

or in the Troubador in California that we think is a good writer, we are not as concerned with his recording. We are concerned if he does perform, but not as much as we are with what he writes, what his songs are. Then we will try to make a deal with him straight out, make a straight writer's deal until he earns the right to come back to us and say now I want a 50-50 deal, I have proven myself.

REDIRECT EXAMINATION (Cont'd.)

BY MR. SCHURTMAN:

Q Is it customary for publishing companies to simply own what I will refer to as naked copyrights without having a special deal with the writer?

A Yes, we have a lot of those. You mean where we own the copyright --

Q Take an old rock and roll song where you simply own the copyright, and I take it your revenues would come from mechanical royalties and from performance royalties?

A Mostly from print, ours.

Q You don't necessarily have to have a situation where you have the writer assigned to you? The writer may be --

A Are you referring to a for-hire situation?

Q I am simply referring to the type of situation we have in this case where Big Seven Music Corporation owns

a number of copyrights.

A Yes.

Q They may have acquired them years ago from someone. They have no special arrangements with writers. They simply own the copyrights outright and whenever somebody uses one of their copyrighted songs, he pays them royalties. Is that a customary situation in the field?

A Yes, we have songs like that. Not a lot of them, but we have some.

RECROSS-EXAMINATION

BY MR. BERGEN:

Q Is there any way of knowing that Mr. Steven Stills recorded You Can't Catch Me because John Lennon recorded it?

A I wouldn't know that, but if I were the publisher of that song I would know it. Hopefully.

MR. BERGEN: No further questions.

(Witness excused)

THE COURT: Next witness.

MR. SCHURTMAN: I believe Mr. Zucker is ready for cross-examination.

H A R V E Y Z U C K E R, resumed.

CROSS-EXAMINATION (Continued)

BY MR. BERGEN:

Q Mr. Zucker, in your earlier testimony you said that you chose the songs Oye Como Va, Daddy's Home, Maybe and My Boy Lollipop. At page 3358 of your testimony you said that Mr. Levy had suggested the songs at one of these meetings.

A That is correct.

Q You really didn't pick the songs, Mr. Levy did?

A No, I didn't say that. A number of songs were brought up during that meeting. I selected those after looking at them which would be appropriate for the circumstances. I might add that there was one in there, a song called Barbara Ann, which I did not include because we only had the foreign rights. This particular song would have been a perfect example for us. This song was recorded by the Beach Boys, rerecorded by the Beach Boys in 1971, and, as you recall, Capitol Records -- they are under contract to Capitol Records -- in 1974 that particular cut was included on their album Spirit of America. I have heard testimony that it sold at least a million and a half copies. That alone would have generated $30,000 for us worldwide. Within a year thereafter a French group recorded the song. It's the No. 1 song in France. We don't have the figures in yet. We have telegramed them and we know the sales are

over 700,000 units. That alone would bring in another fourteen, fifteen, $16,000. I did not include that one simply because we only had the foreign rights, not worldwide.

Q Was there any discussion of including either You Can't Catch Me or Ya Ya?

A The song Ya Ya was brought up. As I said before, I chose not to put that in.

Q Why not?

A As I told you before, John Lennon recorded this in 1974-1975, and I didn't have enough experience to make a prediction on that song. I need a number of years, three, four, five years at least.

Q Did either Mr. Levy or Mr. Kahl tell you during those meetings that the Rolling Stones had recorded You Can't Catch Me in 1965?

A No, they did not.

Q You weren't aware of that?

A No.

Q Wouldn't that ten-year experience of You Can't Catch Me, which was recorded by the Stones in 1965, also be indicative of what the income would be?

A It's possible.

Q Wouldn't that also be --

THE COURT: I just can't keep all of this in my

mind. In other words, let's have the history of You Can't Catch Me again.

MR. BERGEN: You Can't Catch me was originally recorded in 1957 by Chuck Berry. The Rolling Stones --

THE COURT: Just a second.

Is the song sheet in evidence?

MR. BERGEN: Yes.

There is testimony that that version by Chuck Berry is considered a classic, a rock and roll classic.

THE COURT: What happened in 1971?

MR. BERGEN: No, 1965, your Honor, the Rolling Stones recorded You Can't Catch Me.

THE COURT: Do we have any earnings? You are going to introduce that?

MR. BERGEN: Yes, I will, your Honor.

THE COURT: I don't know where we stand. I don't know the meaning of that question that I asked to be reread.

MR. BERGEN: The meaning is if they had a ten-year history for You Can't Catch Me where it had been recorded by a large group, by the Rolling Stones, why not use that ten-year history as opposed to Oye Como Va?

THE COURT: What is the answer to that?

THE WITNESS: The answer was that the song was not brought up and I just did not look at it.

THE COURT: In your judgment, would the ten-year history of You Can't Catch Me since Rolling Stones -- put it this way: Would the history of that song be something that would be as relevant to our present problem or less relevant than Oye Como Va and these others you mentioned?

THE WITNESS: Very honestly, I don't know how popular the Rolling Stones were in 1965.

THE COURT: Would it depend on that?

THE WITNESS: I would think it would have something to do with it.

MR. BERGEN: There was testimony a few moments ago --

THE COURT: Wait a minute. If they were a popular group in 1965, that would be an other situation like the ones you have tried to illustrate, right?

THE WITNESS: That is correct.

THE COURT: Okay.

Q Do you know how many songs there are in the Big Seven catalogue?

A Big Seven alone has somewhere between six, eight hundred songs.

Q So that you picked four songs out of those seven to eight hundred?

A No, we have a catalog of fifteen, twenty

thousand songs in our entire organization. Big Seven alone, the company itself has six to eight hundred songs.

Q That is what I am talking about.

Turning to Defendant's Exhibit 301, and I don't know whether you have the Court copies in front of you or the marked copies -- and I mean Plaintiff's Exhibit 301, I am sorry, and this is the schedule that you prepared, Mr. Zucker?

A That is correct.

Q That schedule doesn't take into consideration, does it, that Ya Ya was also recorded on Rock and Roll and earned 2 cents on 342,000 units, or $6840?

A That is correct.

Q It also doesn't take into consideration --

THE COURT: You are looking at 301 now?

MR. BERGEN: Yes, your Honor.

MR. SCHURTMAN: What is the relevance of that?

MR. BERGEN: It's very relevant.

THE COURT: I guess it's evidence from the exhibit. Anyway, I will certainly note that. Okay.

Q Shouldn't the figure of $10,160 at the bottom have deducted from it the $640?

THE COURT: That is a matter of law. He doesn't have to worry about that.

Q Isn't it also true that Exhibit 301 does not take into consideration the Harry Fox Agency commission of 3 1/4 percent?

A That is correct.

Q Isn't it also true --

THE COURT: What is that amount, 3 1/4 percent of what?

MR. BERGEN: Whatever the amount is on the royalty.

THE COURT: The Fox Agency gets 3 1/4 percent of royalties, right?

THE WITNESS: Yes.

Q Is that correct?

A Yes, it is.

Q Isn't it also true that Exhibit 301 does not take into consideration a finding of this Court that but for the actions of Levy and Adam VIII, Rock and Roll would have sold 100,000 more units?

A That is correct.

Q Since there were two Pig Seven songs on Rock and Roll, You Can't Catch Me and Ya Ya, at 2 cents each, if you took into consideration that 100,000 units additional, you would come out with another $4000?

A Could you repeat that? I don't understand the

question.

Q You would come out with a reduction of $4000?

A I don't follow it, I am sorry.

THE COURT: Read the question.

(Question read)

THE COURT: Mr. Bergen, he has the fact that You Can't Catch Me is included in Rock and Roll, right?

MR. BERGEN: Yes.

THE COURT: The only problem -- I don't know if it's a problem or not, it's just a matter of law. The thing it doesn't include is the fact that Ya Ya was on Rock and Roll. You have called our attention to that.

MR. SCHURTMAN: We are not claiming damages for that.

THE COURT: He is saying there should be a credit.

MR. SCHURTMAN: Why?

THE COURT: We can argue that later. Just to get your point, is there some other discrepancy in this exhibit?

MR. BERGEN: Yes, aside from the Harry Fox Agency and the other thing that is not worked into that exhibit, is that Rock and Roll, your Honor, has found, would have sold another 100,000 units if not for Mr. Levy

and Adam VIII. Therefore it would have earned an additional $4000 because two songs at 2 cents apiece means 4 cents for each unit, which means $4000.

THE COURT: All right.

MR. SCHURTMAN: Are we going to get paid these amounts if we have to pay for an additional 100,000 albums? We will certainly accept it if that is how it falls out. I don't understand Mr. Bergen's point.

THE COURT: This is not a matter for argument. Let's continue with the witness.

Q Exhibit 301 also doesn't take into consideration the writer's share, does it?

A No.

Q And the writer's share is normally a half?

A Normally 50 percent.

Q 50 percent?

A That is correct.

THE COURT: What does that mean, the writer would get half the royalties?

THE WITNESS: That is correct, half the net royalties. In other words, if a song earned $10,000 and we have to pay 3 1/4 percent fee, the writer would get half of that net figure.

MR. BERGEN: I can clear it up, your Honor, by

asking one question.

Q Doesn't that mean that the $1680 figure in the right-hand column under Total should really be $830?

A That is correct.

MR. SCHURTMAN: I object only because --

THE COURT: It's a matter of law. I certainly can get the facts out from the witness that there would be a writer's share, but whether Big Seven would be entitled to get damages after a deduction for the writer's share or whether Big Seven would somehow get the writer's share and account for the writer, that is a matter of law. I don't know what the answer is.

MR. SCHURTMAN: I would want to point out that we would have to pay the writer's share once we get the damages.

THE COURT: That is a matter of damages and I would assume that the people will brief it or have briefed it, hopefully. It must be a standard question of damages. In other words, if you have got -- it seems to me the writer should be suing. Lennon made his claim for royalties independent of Capitol. I awarded Capitol on the counter-claim net profits. I didn't award Capitol something to pay Lennon. Lennon was suing in his own behalf.

MR. SCHURTMAN: I will give you an illustration.

You didn't deduct the AFM payments that have to be made because you evidently assumed Lennon would get the full amount and then the AFM could go after Lennon.

THE COURT: I don't think anybody called it to my attention.

MR. SCHURTMAN: I did, your Honor. Somebody said Apple pays AFM. We brushed it aside. I didn't brush it aside.

THE COURT: If I brushed it aside, I will correct it.

MR. SCHURTMAN: If it's included, then the AFM has to go after Lennon, the writers have to go after us, but the point is we need the revenues in order to make payments.

MR. BERGEN: The real point is that Big Seven cannot sue for the writer's share.

THE COURT: Let me say to everybody that the basic philosophy I was attempting to use on my decision on the counterclaims was to award each party his own losses.

MR. SCHURTMAN: Gross or net?

THE COURT: That was obviously the approach in the case of Capitol because there were all those deductions of royalties that Capitol would have paid and its variable costs and all of that. If in the case of Lennon or anybody

else there should be a correction, you ought to call it to my attention. Of course overall if that is the wrong legal rule I want to know it because we have a continuing issue in this case. But I thought on the counterclaims nobody was really arguing the basic problem and that was, I thought it was assumed by all sides that the only damages people got were net losses.

MR. SCHURTMAN: No.

When you held that Lennon should get royalties on an additional 100,000 albums which weren't sold, you did not deduct the AFM or after payments that should be made by either Capitol, Apple or Lennon. Somebody has to make them.

THE COURT: Let me ask you this: Mr. Prettyman on behalf of Capitol, to my understanding was claiming Capitol's loss of net profits after exclusion of its expenses and costs related to these sales that we were talking about, and I won't try, obviously, to summarize that. That was a position that Mr. Prettyman took and I assume that you would take that position as far as the rule of law. You are saying now that applying that same rule of law to the claim of Lennon, there should have been certain deductions which I did not deduct.

MR. SCHURTMAN: That is right.

THE COURT: I think if you can look back -- do you disagree with that?

MR. BERGEN: I do disagree. There was testimony that Apple paid those fees and Apple wasn't awarded anything. Apple didn't get any damages.

MR. SCHURTMAN: Apple was awarded part of the Capitol damages.

MR. BERGEN: His Honor specifically said that Apple didn't get anything.

MR. SCHURTMAN: Who pays the AFM fees?

MR. BERGEN: Mr. Posner testified that Apple paid them.

THE COURT: Would you do this, I think we don't want something dangling that we haven't covered. When I came into the last session of that counterclaim trial, I had gone over the notes of our February 27 conference, and at that time in a kind of broad-brush way it was stated on the record that the defendant said that as far as Apple, there would just be a flowthrough. When we came into the last session, or one of the last sessions, I told the lawyers that I was not satisfied as a result of our further proceedings with that kind of broad-brush statement about flowthrough, because what I could discern from Capitol's claim, Capitol was claiming net. So what would there be to

flow through to anybody? And it was resolved, at least on the record, by probably not the most thorough analysis, but Apple stood up and simply said we are not making any claims for compensatory damages. Well, if Apple wasn't making any claim, I don't probe it particularly. I accept that and I don't award Apple anything. If they don't want anything, they don't get anything.

MR. SCHURTMAN: Whatever Lennon gets.

THE COURT: I wasn't going to worry about it. I don't have to worry about a claim that isn't being made.

That left Capitol, EMI, and Lennon. I don't want to go back over that now, but I say to you that I think that is one of the things that has to be explored, or may have to be explored further. You have already raised the point about what you say is new information on Canadian sales.

MR. SCHURTMAN: Incidentally, I spoke to Mr. Prettyman yesterday.

THE COURT: It's just one of those things. If you want to assert that there should be a correction of the kind you are taking, then why don't you think about that and let's not just have it done on the spur of the moment. Think about that, get the record references and either in writing or orally you present that. But first present it

to the lawyers so they know what you are claiming.

MR. SCHURTMAN: I have given it to Mr. Prettyman and I told him I would like an explanation.

THE COURT: I am talking about this business of further deductions from somebody's damages. Do that the same way, convey it to the lawyers and we will see a way to resolve it.

Let's take our luncheon rece s now.

(Luncheon recess.)

l mmsr

A F T E R N O O N S E S S I O N

[2:15 p.m.]

THE COURT: You may proceed.

MR. BERGEN: I wish to continue with Mr. Zucker.

H A R V E Y Z U C K E R , resumes.

CROSS-EXAMINATION [continued]

BY MR. BERGEN:

Q Mr. Zucker, to go back to the songs that you analyzed from the Big Seven catalog, were there any songs that you were told of by Mr. Levy or Mr. Kahl that were recorded by major artists at some point?

A The only songs that I was told or that I looked at were those that he told me to look at and those that we discussed during our meeting, and those are the ones that I chose.

Q Did they tell you whether any other song from the entire Big Seven catalog was ever recorded by major artists?

A We had discussed during that meeting songs that would fit into the category that we needed for this case.

Q Fit into what category?

A Where a major artist or a lesser known recording artist re-recorded the songs. The only songs that were brought were these six or seven songs.

Q As far as you know, there were no other songs in the Big Seven catalog that were recorded by a major artist?

A I didn't say that. These were th e onest that were brought up . There are 20,000 songs approximately.

Q Do you know why or was it discussed at these meetings why these four songs fit into this category?

Let me ask you one question before that: What do you mean by this category?

A A category where a major artist re-records one of our songs, or a lesser known artist re-records one of our songs.

Q What were the discussions as to which songs fit into the category?

A There were no discussions per se. Mr. Kahl and Mr. Levy discussed certain songs and brought them up during the meeting. They told me to look them up, I did, and I used them. The only ones I didn't use was Barbara Ann and Ya Ya, which I discussed previously.

Q You said that Ya Ya was discussed?

A Ya Ya was brought up only in the context that John Lennon did record it, but I disregarded it in my projections .

THE COURT: Make it clear why you disregarded Ya Ya.

THE WITNESS: Again, Ya Ya was recorded by Mr. Lennon in 1974 or 1975. I needed a basis of at least three or four years minimum to get the earnings on the cover. Ya Ya did not have that yet. As you can see from my projections, my projections are based only on three or four years' earnings. I am sure that if I continued it for seven or eight or nine years, the earnings would have been much higher.

Q I show you Defendants' Exhibit DR for identification, which is the song sheet for Ya Ya, and I call your attention to the second page, a license to the Beatles dated February 11, 1970, for the recording of Ya Ya. Were you aware that the Beatles had issued a recording of Ya Ya?

A No, I was not.

Q You weren't told that?

A I was not.

MR. SCHURTMAN: That the Beatles released Ya Ya?

MR. BERGEN: I am saying that there is a license.

MR. SCHURTMAN: It was never released.

MR. BERGEN: If Mr. Levy is going to testify from sitting there --

THE COURT: Take it one step at a time. We will

see what this witness knows and then you can interrogate Mr. Levy.

Is that, again, the song sheet?

THE WITNESS: Yes.

THE COURT: This is what exhibit?

MR. BERGEN: DR.

THE COURT: And it shows that the Beatles got a license for Ya Ya in 1970?

MR. BERGEN: It shows that there were two licenses, one issued to Polydor, Inc., the Beatles, 2/11/70 and then another one right below that, Polydor, the Beatles, 4/22/70.

MR. SCHURTMAN: Your Honor, may I have a direction from the Court that Mr. John Lennon should appear as a witness again, because I think he would be the best person to tell us whether the Beatles released that song or not, if Mr. Bergen wants to make an issue of it.

THE COURT: I would be very happy to have the entire cast all over again, but we really have to save time. Now, that is a piece of information that should be able to obtained of somebody.

MR. SCHURTMAN: Mr. Bergen knows, since he represents Lennon.

MR. BERGEN: I don't know. I am going by

your document that you produced to us.

THE COURT: It is a point that has come up. I ask you to try to check it out without having somebody come down and testify.

MR. SCHURTMAN: We know the answer, but the question is from whom you will accept it.

THE COURT: I will assume that the lawyers will get together and find out and stipulate.

MR. SCHURTMAN: I am prepared to stipulate right now that the Beatles never released it.

THE COURT: Mr. Bergen wants to check it out. Please check it out some way. If it is a matter of importance, let us take care of it the simplest way we can.

Let us go to the next question for this witness.

Q Are you familiar with a group called Tommy James and the Shondells?

A Yes.

Q Are they a group that records for Roulette?

A They did record for Roulette.

Q Were they a major recording group?

A Yes.

Q Did anybody tell you at these meetings that apparently Tommy James and the Shondells recorded Ya Ya in

1966?

THE COURT: What is the spelling of Tommy James and what?

MR. BERGEN: -- the Shondelles -- S-h-o-n-d-e-l-l-s.

THE COURT: Did they record Ya Ya in 1966, do you know?

THE WITNESS: I really don't know. I know we issued a license for them.

Q In fact, there are two licenses, aren't there?

Have you ever heard of an artist named Bobby Freeman?

A Yes.

Q Wasn't Mr. Freeman a major recording artist in the early sixties?

A He had one major hit, yes.

Q I show you again Defendants' Exhibit DR. Doesn't that indicate that Mr. Freeman, Bobby Freeman, recorded Ya Ya in November, 1964?

A That is correct.

Q Did anybody tell you in these meetings that Mr. Freeman had recorded Ya Ya?

A No, they did not. May I also point out, however, that the earnings on this song are quite substantial.

The earnings, the net earnings to our company are well over $65,000, possibly $70,000, $75,000. If it was an error, it was an error because it was on the low side; if it was anything.

[Defendants' Exhibit DU marked for identification.]

Q Mr. Zucker, I show you a document that has been marked as DU, I ask you, have you ever seen this document?

A Yes, I have.

Q Can you identify it for the record, please?

A This was a schedule that you asked us to prepare on the catalog of Big Seven music which I believe was for the last five years, the total domestic performance royalties of the company of some that made up at least 75 per cent of those domestic performance royalties.

Q So this was a schedule that you prepared in response to or at our request?

A Yes.

MR. SCHURTMAN: Do you have a copy of it?

MR. BERGEN: No, I don't.

MR. SCHURTMAN: Do you mind if I look over your shoulder when you question the witness?

MR. BERGEN: No.

Q Can you explain, Mr. Zucker, why none of the

four songs that you have used in your projections appear on this schedule which purports to represent 75 per cent of the total performance royalties?

A This is the Big Seven Music Corporation itself, not the entire organization.

THE COURT: I don't hear you.

THE WITNESS: This schedule represents only those songs in the Big Seven catalog, not in the entire organization's catalog. I had discussed this with, I believe, Mr. Strauss and possibly you at the office, whether or not we should include the entire catalog, and at the time I was told not to . That is it.

Q Wasn't it prepared before Mr. Strauss and I went over to Big Seven's offices and met with you?

A Yes, and then you questioned me -- I believe you questioned me.

Q Not me.

A One of the other attorneys then, whether or not it included all the other catalogs, and I said it didn't, and that was it.

Q So that the four songs that you used in your projections are not Big Seven songs?

A No, they are not.

Q How many of them are Big Seven songs?

A I don't think any of them are.

Q None of them?

A No.

Q So you were not able to find any song in the Big Seven catalog that you were able to make a projection on as to the damages?

MR. SCHURTMAN: I object.

MR. SCHURTMAN: I object. The witness has testified several times that he didn't select the song. He was told to use certain songs and he simply did the accounting work.

THE COURT: Well, he participated in a project. I take your point, Mr. Schurtman, but anyway, go ahead.

MR. BERGEN: I offer this in evidence, your Honor.

THE COURT: What is the point of DU? What does it show?

MR. BERGEN: It shows that Big Seven really, of the songs that are provided, 75 percent of the performance income, none of those songs were used in this projection, and I think that is relevant to show just whether there was any song that should have been used.

MR. SCHURTMAN: I don't think that is relevant, your Honor. We have thousands of songs. We couldn't bring them all in. You have a similar situation in the counter-claim phase when Mr. Bergen questioned one of his witnesses about a particulrr song and when I raised a question of why --

THE COURT: Don't drag that in.

MR. SCHURTMAN: It's the same principle.

THE COURT: I can't think back. I don't remember all that right now.

As far as this specific document again, Mr. Bergen, what does it show?

MR. BERGEN: Your Honor, I just would like to show that the plaintiff has been very selective in the four songs that it has chosen. They have gone through 20,000 songs and picked out four that they think are going to prove their damages, and Mr. Zucker has testified that he wasn't told about You Can't Catch Me and the fact that the Rolling Stones recorded it. He wasn't told about the earlier recordings of Ya Ya, all of which could have enhanced the copyright, but there weren't any projections made on those or on these songs.

THE COURT: Take it one step at a time. This is hard physically to read. These columns, are they songs?

MR. BERGEN: Each one is a song and those songs, I think Mr. Zucker testified, represent the songs in the Big Seven catalogue that accounted for 75 percent of the domestic performance income.

THE COURT: And these columns show yearly royalty income?

THE WITNESS: That is correct.

THE COURT: Just a second. And naturally, as I guess it's self-evident, none of these songs were used in your statistical analysis, right?

THE WITNESS: That is right.

THE COURT: All right, I will take it. Anyway, there is no objection.

(Defendants' Exhibit DU received in evidence.)

THE WITNESS: May I point out also on that schedule that many of those songs may not have been recorded by other recording artists. I don't know.

THE COURT: Okay.

Q But they earned substantial performances?

A Sure.

MR. BERGEN: Mr. Schurtman, can you give Mr. Zucker Plaintiff's Exhibit 302, please.

Q I show you Plaintiff's Exhibit 302, Mr. Zucker, which is a schedule that you testified you prepared. Is this a similar situation to Exhibit 301 where there is no consideration given to the fact that Ya Ya was recorded on Rock and Roll and earned $6840 for Big Seven?

MR. SCHURTMAN: I object to the question both as to form and as to relevancy. What does that have to do with anything?

THE COURT: What does it have to do with anything?

MR. BERGEN: Again, the schedule is incomplete. It doesn't give any credit for the fact that Ya Ya was on

Rock and Roll.

MR. SCHURTMAN: Why should we give credit?

MR. BERGEN: Because you earned the money.

THE COURT: Just a minute.

I keep thinking that I have those royalty records on hand and I guess I don't. Where does the bottom set of figures in 302 come from, where it says, "One song excluded on Rock and Roll"?

MR. BERGEN: The 16,872 I gather comes from 303-A which is this long sheet.

THE COURT: I guess I don't have that with me.

MR. BERGEN: It's the long schedule that shows loss -- it says "Revised Loss of Foreign Mechanical Income."

THE COURT: All right.

MR. BERGEN: I gather the figure above the $648 comes from 2 cents an album times 342,000.

THE COURT: I would assume that this schedule, 302 -- and we don't have to ask the witness -- does not give any credit for royalties for Ya Ya in the Rock and Roll album, right?

THE WITNESS: Of course not.

THE COURT: Nor does it claim any -- does it take into any account extra 100,000 album sales of Rock and

Roll, is that correct?

THE WITNESS: That is correct.

THE COURT: I am not saying it should or shouldn't.

MR. SCHURTMAN: This is one point in which I think we can save time. The questin of whether the double recording of Ya Ya was important or not was answered by your Honor in a statement made during the first trial. I have quited it in my brief. It's five lines long. Your Honor said when that same point was made to you, "I find it very difficult to believe that two recordings of Ya Ya satisfies the language of three compositions. I will tell you that right now. I don't think you have to bother with that."

I don't think Ya Ya is relevant to this.

THE COURT: That is a question of law, interpreting the contract. We don't have to bother this witness.

Have you got any more questions of this witness?

MR. BERGEN: Yes, I do. I would like to respond --

THE COURT: You don't need to. I want to get through this afternoon with as much evidence as we can and save argument until later.

Q Looking at Exhibit 303-A, Mr. Zucker, and I hand

you that exhibit, looking at the figure on the right-hand column titled Gross Royalty, what is the foreign publisher's share of that figure for each of the foreign countries listed in 303-A?

A It varies according to country. We have 100 percent owned subsidiaries that keep for themselves 50 percent of the royalties. They in turn submit the other 50 percent to our domestic corporation. We in turn will pay the writer 50 percent of what we receive. Therefore, if it's 100 percent on subsidiary, we would retain almost 75 percent of the earnings.

Q If, for example, on a record sold in Australia, which is the first country, and you had 100 percent owned subsidiary in Australia, Big Seven would really, if the royalty was $2, would really only wind up with 50 cents of the $2?

A Big Seven itself, but its 100 percent owned subsidiary would wind up with the other dollar.

THE COURT: Are you saying in each case for every country you had a 100 percent subsidiary?

THE WITNESS: For most cases.

THE COURT: Are there any cases in 303A where you did not have a 100 percent subsidiary in a foreign country?

THE WITNESS: Yes.

THE COURT: Where?

THE WITNESS: Let me give you the countries we do have a 100 percent subsidiary. That would be Australia, Germany, the United Kingdom and South Africa.

THE COURT: All right.

THE WITNESS: Also I would like to add that in France we had a 50 percent owned subsidiary.

THE COURT: Which leaves what? Belgium, Brazil, Denmark and so forth?

THE WITNESS: Right.

THE COURT: What is the situation in those latter countries?

THE WITNESS: Those latter countries they take of varying percentages --

THE COURT: But you don't have any subsidiaries at all?

THE WITNESS: No.

THE COURT: And there are companies there that

jqlt 2 Zucker-cross

have licenses from Big Seven?

THE WITNESS: They issue the licenses themselves through their representatives. We have representatives.

THE COURT: You have representatives --

THE WITNESS: In those countries not owned by our companies here.

THE COURT: What we are interested in is whether you make the entire amount of money or not in some form.

THE WITNESS: Generally we would keep both in the domestic corporation and in our subsidiaries approximately 60 percent of the income earned.

THE COURT: Is that on an average?

THE WITNESS: That is on an average, yes.

THE COURT: And you are talking about Big Seven and the subsidiary?

THE WITNESS: That is correct.

THE COURT: That is taking into account the countries you don't have any subsidiaries in?

THE WITNESS: That is correct.

THE COURT: Okay.

Q So that which of the figures in that right hand column should be reduced pursuant to what you have just testified to where Big Seven really does not wind up with anymore than like 50 cents out of the $2 royalty?

A As I said, assuming we would earn $17,000, rounding off figures, we would retain 60 percent of that $17,000. We would retain it here in this country plus our 100 percent owned subsidiaries in total after deducting royalties, paying to writers and any other fees that might be involved.

Q Where do you get the 60 percent figure where if some of them are 100 percent owned subsidiaries, one is a 50 percent owned subsidiary, how do you arrive at the 60 percent figure for the whole group of countries?

A For example, let's take the United Kingdom. Here there are $6,000 earned in total. $3,000 of that would remain in our subsidiary in the United Kingdom. They would have that money, do not pay any royalties on it, it just remains in that country.

Therefore, we have earned $3,000 in that country.

Q When you say "we" you are talking about the foreign subsidiary?

A Yes.

They in turn would submit $3,000 or remit $3,000 to Big Seven. Big Seven then would pay the writer 50 percent of the $3,000 or 1,500. Therefore Big Seven would keep $1,500 and the foreign subsidiary would keep $3,000. Therefore, on this particular example they would keep 75 percent of the royalties.

Q You haven't explained how you get to the 60 percent figure of $16,862. You're just taking a rough estimate?

A It's pretty close. I might be off one or two percentage points either way, depending upon the break in the countries. I would think possibly it would be a little higher in case since the United Kingdom, France and Germany represent the majority of the earnings.

THE COURT: Where are we?

THE WITNESS: I'm saying that the final figure we would retain 60 percent of the gross royalties earned.

THE COURT: All right.

Q 60 percent of $16,872?

A That's correct, after deducting writers' royalties and everything else.

Q That includes the foreign subsidiaries?

THE COURT: What is that?

Q That includes the foreign subsidiaries?

A Yes, it does.

MR. BERGEN: I don't want to argue or get into an argument, but it is Big Seven who is suing here, not the foreign subsidiaries and not the writers who they are going to pay.

The $16,000 figure really isn't even close to

what Big Seven's damages are.

THE COURT: Take it one step at a time. You are saying that you consider Big Seven and its subsidiaries together they retain 60 percent of this 16,872 after payment of everything including writers' royalties?

THE WITNESS: That is correct.

THE COURT: And this is an average figure, right?

THE WITNESS: Right.

THE COURT: We will worry about the technicalities later. I get your point, whether Big Seven can recover or whether we have to have the Italian subsidiary come in and sue. Maybe you want to amend your claim and sue on behalf of the South African subsidiary.

MR. SCHURTMAN: We have the same problem on the other side, your Honor.

THE COURT: And add plaintiffs.

MR. SCHURTMAN: On the counterclaim Capitol Records, Inc. is the one that asserted the claim and yet there has been testimony that there are a number of different Capitol companies that all get a piece of the action. I never raised the argument --

THE COURT: Maybe it is an argument you should have raised. Now we get all these other parties in and split it all up. I think we should not have all that complication.

MR. SCHURTMAN: If that is going to be an issue, I would like to raise it.

MR. BERGEN: The other point --

THE COURT: We have enough problems.

MR. BERGEN: One other point, your Honor:

Big Seven is suing for damages based on the failure to record a song. I hardly think that they can sue for the writer's share on a song when who are they going to pay the writer's share to?

THE COURT: That is a problem we mentioned this morning and we have to sort that out and give it a little more thought. As long as we have the evidence we now have the writer's share excluded from this. Whatever legal effect there is at least we have the evidence.

Q Again, looking at 303A under the heading -- there is no longer a heading entitled "Retail Selling Price," why was that taken off from the previous exhibits?

A No reason at all. I just left it off.

Q In figuring out the gross sales, did you figure in the packaging allowance?

THE COURT: Wait a minute. Where are we?

MR. BERGEN: 303A, under the heading "Gross Sales."

Q Isn't it customary in foreign countries to have a

packaging allowance?

A At times there is, yes, depending upon the country. I also did not take into consideration the additional price of tapes which would have increased our royalties to a great extent. I disregarded both ends if you want to put it that way.

THE COURT: Let me just get the concept.

Sometimes there is something called a packaging allowance?

THE WITNESS: Yes.

THE COURT: Let me get that down.

What is that?

THE WITNESS: It is an allowance of the retail selling price from which you compute royalties. Sometimes it is nothing, sometimes it is 10 percent.

THE COURT: Who is it paid to?

THE WITNESS: It is not paid to anybody. It is just a deduction for your base to compute royalties. It is a blanket deduction.

THE COURT: From mechanical royalties?

THE WITNESS: That is correct.

THE COURT: What is this, is it imposed by law or what?

THE WITNESS: By contract.

THE COURT: So you were really precisely calculating the royalty you would make those deductions from the gross sales; is that right?

THE WITNESS: On a country by country basis, yes. Some countries we don't have packaging allowances.

THE COURT: What was your explanation for not doing this?

THE WITNESS: There are some countries that didn't have them. Some I'm not too sure about. I'm not sure about Brazil and some of the other countries. I also did not take into consideration the factors which would have increased our royalties only because I really didn't know all of the factors involved.

For example, tapes usually represent approximately 30 percent of our sales. The tapes retail were $1 more than the album. That is not taken into consideration here. That also would have increased our royalties.

THE COURT: Any other increasing factors?

THE WINTESS: I can't think of any more now.

THE COURT: Go ahead, Mr. Bergen.

Q Isn't it also true, Mr. Zucker, that in Japan there is a tax which is withheld at the source?

A That is correct.

Q And that isn't figured into this exhibit either,

is it?

A No, it is not.

THE COURT: What was that?

MR. BERGEN: That isn't figured in this exhibit either.

THE COURT: What country?

MR. BERGEN: Japan.

THE COURT: What tax is there in Japan?

THE WITNESS: I believe you're referring to the income tax?

MR. BERGEN: Yes.

THE WITNESS: The income taxes in our country right here, we get a 100 percent credit against our own income taxes here and in many countries we also do not have taxes deducted.

What I am saying to you is that the net effect is zero. We do get 100 percent benefits of any taxes paid to a foreign country because of the foreign tax credit.

Q Taking another example, Mr. Zucker, where did you get the figure for the 8 percent royalty rate for Japan?

A The royalty rates were given to me by Mr. Kahl if I didn't have them available to me. Mr. Kahl contacted various countries and we used those rates. Where I didn't know the rates, I used the low percentage of 6-1/2 percent.

Q Do you know that the rate for an album in Japan is really 5.2 percent?

A I'm not aware of that.

MR. BERGEN: I would like to mark this.

(Defendant's Exhibit DV was marked for identification.)

Q I show you a document that has been marked as Defendant's Exhibit DV for identification which appears to be an article from Billboard, April 17, 1976, and I direct your attention to the second paragraph, where it indicates that the mechanical royalty --

MR. SCHURTMAN: Before you read it in, may I see it, becauseit is not in evidence.

MR. BERGEN: Sure.

MR. SCHURTMAN: I object to this. This is hearsay offered for the truth of the contents.

THE COURT: May I see it?

MR. SCHURTMAN: I have no way of cross examining this.

(Pause.)

THE COURT: I will sustain the objection. The only thing is if there is a question, it would seem to me it would be incumbent upon you to substantiate it. I don't think this thing from Billboard is particularly very good. You can use it on cross. Ask him about it, but I don't want it in evidence because I don't know whether it is reliable or not. You could question him about it and say, "Does this sound familiar?" Or whatever you want to do.

MR. BERGEN: I think there was pretty heavy reliance put on Billboard.

MR. SCHURTMAN: For different purposes.

Q Do you know about the range of 5.2%?

A I do not.

Q You are going on what Mr. Kahl told you, that it was 8%?

A That is correct.

Q Referring again to 303A, did you prepare a schedule similar to 303A for foreign results on Walls and Bridges?

A Yes, I did.

MR. BERGEN: Has that been produced?

Q Is that 302B?

A Yes, it is.

Q Is there a reason why it is not as detailed as 302A?

A Yes, this was information submitted to me by Capitol.

THE COURT: What is the exhibit? 302?

MR. BERGEN: 302B.

Q Now, going to Plaintiffs' Exhibit 201, I show you Plaintiffs' Exhibit 201, which is the schedule covering Oye Con 'O Va. I will try to go through it very quickly. The Santana record was a single.

A A single and an album, yes.

Q Can you tell us now how much of the $179,026 was generated directly by mechanical royalties and performance monies from the Santana single album?

A Not now, no, I can't.

THE COURT: How long would it take you to get that? I regard that as extremely important.

THE WITNESS: They are working on it right now.

THE COURT: Will they have it this afternoon?

THE WITNESS: I doubt it very much. Many of these royalty statements only have the name Oye Con 'O Va with possibly a reference to a record number. We would have to contact the record companies and find out what recordings they are submitting to us. Many record

companies do not break it down for us, so we would have to contact these record companies and try to get the information.

MR. SCHURTMAN: You should be aware of one thing, when royalty statements are given, they normally do not show the artist or the record, they simply say Oye Con 'O Va has earned so much during this quarter.

THE COURT: These are statements submitted to you by Fox?

MR. BERGEN: The royalty statement normally shows the record number and the license number.

MR. SCHURTMAN: Here is a typical Fox report.

THE COURT: Let me see the royalty statement. I have got a statement that says Capitol Records - EMI. It has got a whole lot of names up here. Doesn't it tell who the licensee is and the record number?

THE WITNESS: It tells the record number and the song.

THE COURT: And the licensee?

THE WITNESS: These are domestic.

THE COURT: From that you can tell what Santana is?

THE WITNESS: That is what we are trying to do.

THE COURT: They are working on it. Go ahead.

Q As far as Plaintiffs' Exhibit 201 goes, the Santana recording of Oye Con 'O Va is comparable to the Lennon recording of the song, that is the purpose? In other words, the Lennon recording is the same for your purpose in this projection as a Santana recording?

A The purpose of this is to show that when a major artist records a song --

THE COURT: I think I have that.

Q Now, referring to Plaintiffs' Exhibit 201A, which is the song sheet for Oye Con 'O Va, isn't it true that that song sheet goes a number of cover records within the year following the Santana recording?

A Yes, it does.

Q That shows the cover records by the VEntures, Percy Faith and his orchestra?

A That is it.

THE COURT: That is within t he year?

MR. BERGEN: Yes.

THE COURT: How many?

THE WITNESS: I think there are two or three.

MR. BERGEN: There is one by the Joe Cuba Sextet.

THE WITNESS: That was one of our artists.

MR. BERGEN: It is still another record. The

Ventures, Percy Faith, and there was another, the Savor Tropical Orchestra. So it is four cover records.

THE COURT: In a year?

MR. BERGEN: Yes.

Q You testified about this record Daddy's Home, that it appeared or was recorded by the Carpenters?

A Yes.

Q You said something about in Japan. Was that at a concert?

A It was a concert in Japan.

Q So that album was a live album?

A Yes.

Q Do you know whether that version of Daddy's Home was released as a single by the Carpenters?

A I have no idea.

Q I believe you also said with respect to Mollie Small, that she was an artist that was unknown to you.

A That is correct.

THE COURT: Where is that?

MR. BERGEN: On Exhibit 204, your Honor. I believe that is My Boy Lollipop. If you take a look at the last page, the second page, you will see that recording.

Q Tell us how that is comparable to Lennon.

A I notice we had the song in our catalog in 1957.

Then Millie Small picked it up and recorded it. Then we find out almost ten years later Maggie May is recording this song and earning net to our companies over $30,000.

Q Are you saying that Maggie May recorded it because Millie Small recorded it ten years ago?

A I don't know why Maggie May recorded it, but I make that assumption.

Q Maggie May recorded it when an unknown artist recorded it ten years before?

A After the unknown artist recorded it, it became a popular song.

THE COURT: He testified on direct that he thought that John Lennon would have more effect on a record or song than Millie Small. So that has been covered.

Q In order to calculate the value of Lennon's recording a third song, wouldn't you first have to assume that someone would record that song because of Mr. Lennon's record?

A That is correct.

Q And then wouldn't you have to assume that the cover record was a hit and generated income?

A It all depends on who records the cover record. For instance, if you know a cover record may not be a hit and is recorded by another artist, that enhances the

value of the copyright. I believe that answers your question. I am not sure.

Q After you assume that, then you would have to assume that the amount of money that would flow from the performance and the mechanical royalty income from that cover record?

A That is correct.

Q Is there any way of really putting a figure on that?

A Not precisely. That is impossible. Nobody can foretell whether an album or record will sell 400,000 or 401,000. However, accounting wise and statistically you can predict based upon some past experience and what an artist of Mr. Lennon's caliber can do. Whatever you project, I believe you should add on a value for Mr. Lennon's stature.

Q Mr. Zucker, I show you a document that has been marked as Defendants' Exhibit DW. I would just like to state for the record that the marks on it are mine. I have made some notes on it and I crossed them out.

Can you identify this, please?

A This is the domestic performance royalties for Ya Ya, Angel Baby and You Can't Catch Me.

Q This was prepared by you in response to a

request by us?

A Yes.

MR. BERGEN: May I offer it in evidence?

MR. SCHURTMAN: Do you have a copy?

MR. BERGEN: No.

MR. SCHURTMAN: For what purpose?

MR. BERGEN: To show the performance income of Ya Ya, You Can't Catch Me and Angel Baby.

THE COURT: I will receive it. What is the exhibit letter?

MR. BERGEN: DW.

[Defendants' Exhibit DW received in evidence.]

THE COURT: Performance income?

MR. BERGEN: Yes, your HOnor.

THE COURT: These are things made up by Big Seven?

MR. BERGEN: Yes, sir.

Q Mr. Zucker, does the Santana record Oye Con 'O Va, is that on CBS?

A Yes.

Q And didn't Janice Joplin record one of these songs on CBS also?

A Whatever it says.

THE COURT: Which one?

MR. BERGEN: I think it is Maybe, your Honor. The song sheet, Plaintiffs' Exhibit 203A, shows that Janice Joplin recorded Maybe on CBS.

Q Mr. Zucker, doesn't CBS have an affiliate record company called the Columbia Record Club?

A Yes.

Q Doesn't that record club give the artist and the recordings a lot more exposure?

A It gives it good exposure, yes.

Q It gives it additional exposure, in addition to the normal sales in the marketplace?

A Every record gets the same type of exposure.

Q Every record goes through record clubs?

A Every one that is popular; the majority of the records are exposed to the record clubs.

THE COURT: I don't understand.

THE WITNESS: RCA or Columbia have clubs where you join and you pay a small amount of money to join the club and you get certain records that you have to pay the retail price for and buy five or six in any year.

THE COURT: They just circulate Columbia records?

THE WITNESS: No, they circulate many, many

other records, not just Columbia.

THE COURT: So they might circulate Capitol?

THE WITNESS: They do -- whether it is Capitol I am not sure -- but they do circulate dozens of other record companies.

MR. BERGEN: I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. SCHURTMAN:

Q When you testified that the writer shares 50% in certain types of royalties, what royalties were you referring to?

A Only on mechanical royalties. Performance royalties we retain 100% of what we receive.

THE COURT: The writer's share is 50% of mechanicals?

THE WITNESS: Yes.

Q This is something you have to pay the writer?

A Yes, that is correct.

THE COURT: In other words, the publishing company retains 100% of the performance royalties?

THE WITNESS: That is correct.

THE COURT: Do you pay ASCAP?

THE WITNESS: ASCAP does that directly. We are

not involved in that at all.

Q With respect to the Harry Fox collection fee of 3/4% I have two questions: If you are going to pay 50% of your performance royalties to the writer --

A Mechanical royalties --

Q -- mechanical royalties -- I am sorry -- is the writer then accountable for half of the 3/4% collection fee?

A Yes, he is. If the Harry Fox Agency deducts $10, $5 of that is attributable to the writer.

I would also like to point out at the end of each year the Harry Fox Agency rebates to all publishers a certain percentage of that fee and that rebate varies anywhere from 10 to 20 to 30 to 40% at times. That rebate we do not give back to the writer, we keep it for ourselves ..

Q So that your share of the 3/4% collection fee would be half of 3/4%?

A Right.

Q Less the 30 or 40% rebate?

THE COURT: What do you say the rebate is? How much rebate?

THE WITNESS: It all depends on how much profit the Harry Fox Agency makes during the year.

THE COURT: What is the average?

THE WITNESS: I can't say. Mr. Strauss can say, since he is one of their auditors. I know at times we got back 40%. I know at times we got back 20%. I can't say for sure. That rebate remains in our company.

Q I take it, just to get the figure down, half of 3 1/4 percent would be 1.625 percent?

A It sounds right.

Q Less a 40 percent rebate, and that would be 40 percent of 3 1/4 percent?

A That's correct.

MR. SCHURTMAN: No further questions.

(Witness excused)

THE COURT: Who is the next witness?

MR. BERGEN: I realize Mr. Levy is here. I would like to get Mr. Strauss on.

THE COURT: Fine. Do you want to take Mr. Strauss after the recess?

MR. BERGEN: Yes.

THE COURT: Okay.

(Recess)

MR. BERGEN: We call Leo Strauss, your Honor.

L E O S T R A U S S, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

MR. BERGEN: Before we start with Mr. Strauss, can I get clear on the record that Big Seven is not seeking any damages for loss of sheet music sales?

THE COURT: Mr. Schurtman said that this morning.

MR. SCHURTMAN: That is correct.

THE COURT: All right, that is right.

DIRECT EXAMINATION

BY MR. BERGEN:

Q State your address.

A 315 Wearimus Road, Hohokus, New Jersey.

Q Are you a Certified Public Accountant, Mr. Strauss?

A I am, I am Certified in the States of New York, New Jersey and California.

Q What about England?

A I am licensed to practice by the Board of Trade in England also, yes.

Q Can you tell us what firm you are with?

A I am a partner in the accounting form of Prager & Fenton.

Q Can you tell us briefly your background beginning when you became an accountant?

A Yes, I graduated college in 1948 and started work as an accountant, and I became certified in 1950 in New York, and thereafter in th[illegible]ther states. Most of my practice has been devoted with the firm of Prager & Fenton. I started with them. For some time I was on my own doing per diem work for them, and then I returned to them as a

partner in the mid-fifties, and I have been a partner with that firm since that time.

Q Can you describe the main area of Prager & Fenton's practice?

A Yes, aside from a regular accounting practice, our firm specializes in royalty and investigatory audits in the record industry, as well as in motion picture and film. Primarily in the record and music industry.

Q Can you describe in a little bit more detail what you and Prager & Fenton do in that area?

A Yes, our function within that area is basically to examine various record companies or licensees to verify the accuracy, or ascertain the accuracy, of the royalty accountings, or licensor accountings, that have been rendered, to find out if there are any discrepancies and render a report.

Q In that capacity, do you review the royalty statements from the record companies?

A Yes, we do.

Q Have you also had experience with respect to royalty statements for publishing companies?

A Yes, we do.

Q Can you tell us any of your activities as an accountant outside of Prager & Fenton, any societies that

you are a member of?

A Yes, over the course of the years, most of my billable time is involved in this type of work, and back in the early 1960's or the late 1950's, I became a member of the Entertainment Industry Accounting Committee of New York State Society of Certified Public Accountants, and after a few years as a member of the Committee, I served as Chairman of that Committee for a few years. Currently I am serving on the American Institute of Certified Public Accountants. There is a task force on the entertainment industry and that task force is drawing accounting position papers for sound accounting within the various entertainment industries, and they have already put out a booklet on broadcasting and motion picture. They are in the process of drafting one on the music and record industry, and I am Chairman of that subcommittee drafting that paper.

Q How big a firm is Prager & Fenton?

A Prager & Fenton has at the present time seven partners, approximately 30 staff members, plus the secretaries, filing clerks, and that emcompasses our three offices in New York, Los Angeles, and London, England.

Q Would you describe the extent or the breadth of Prager & Fenton's experience with respect to record company audits and publishing company audits?

A We feel that we do more audits than any other company by far. We have developed this expertise over many years and we feel that we are the premier accounting firm within this field, and as such, aside from the professional activities that I just enumerated, I have given lectures at various organizations, both CPA organizations, Bar Associations, and international music industry conferences.

Q In connection with this case, have you reviewed, Mr. Strauss, the various schedules introduced by the plaintiff and prepared by Mr. Zucker?

A Yes, I have.

Q With resepct to Plaintiff's Exhibit 301, have you prepared a schedule of your own?

A Yes, I have.

MR. BERGEN: May I mark this, your Honor?

(Defendants' Exhibit DX marked for identification.)

Q Mr. Strauss, I show you Defendants' Exhibit DX for identification and I ask you to identify that.

A Yes, this is a schedule that I prepared and redrafted and worked on as recently as a half hour ago.

Q Would you go through Defendants' Exhibit DX, and I might as well offer it in evidence right now, your Honor.

THE COURT: Any objection?

MR. SCHURTMAN: I object to it, your Honor.

THE COURT: What do you object to?

MR. SCHURTMAN: Until he explains what it is.

THE COURT: We have to have it --

MR. SCHURTMAN: Mark it for identification.

MR. BERGMAN: I already have.

THE COURT: Let's not waste one more minute. I will receive it. It represents his analysis and I will assume it's a summary of his testimony. It's an aid to reviewing it. It's received.

MR. SCHURTMAN: I do want to state my objection.

(Defendants' Exhibit DX received in evidence.)

Q Would you go through Defendants' Exhibit DX from the top and explain it, please.

A Yes, I attempted to --

THE COURT: Let me get out this 301, if I could, please.

Q Let me show you Defendants' Exhibit 301.

A What I attempted to do is working with the figures that Mr. Zucker presented and revised them based upon my understanding of what has been transpiring here. The first alternative that Mr. Zucker presented in his Exhibit 302 was one song excluded on Walls and Bridges, and

that is what I label as alternative 1, and I assumed that if three songs had appeared on Walls and Bridges domestically, it would have earned $25,500 in mechanical, being the 425,000 unit sales times the 6-cent royalty, three songs at 2 cents each. Actually reported --

Q Can you state what you mean by reported?

A Actually accounted to Big Seven on royalty accountings were 425,000 Ya Ya on Walls and Bridges, 342,000 units of Ya Ya on Rock and Roll, and 342,000 units of You Can't Catch Me on Rock and Roll, a total of 1,109,000 units, which at 2 cents aggregates $22,180, or a net difference of only $3320. Deducting the Harry Fox Agency commission of 3 1/4 percent, and here I started rounding some figures slightly, I arrived at a balance of $3200.

Then, as I understand it, that Rock and Roll would have sold another 100,000 units, and I credited Big Seven for that 100,000 units at 4 cents, being two songs or $4000, which would have meant that if those records had been in fact sold, Big Seven would have received more royalties than it did, or than it would have under the three songs on Walls and Bridges. So I have a credit figure of $800.

I then went to the foreign calculations.

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Q Where did you get the foreign classifications from?

A I believe I had marked it 302 but that was changed. It is 302. It is on Mr. Zucker's schedule which is marked 302. Walls and Bridges earned $19,893 based on Mr. Zucker's calculations and Rock and Roll earned $16,872 or approximately a net difference of $3,021.

I then reduced that by the adjustments for the packaging allowances which are utilized in the foreign territories before the royalties are calculated and also the collecting fees that the foreign societies deduct before transmitting to the local publishers and I estimated those two items at about 20 percent and the reason that I did that is packaging in many of the western European countries is 6-1/2 percent and the collecting fees in many of the European western countries are 15 percent, but of course they fluctuate to some degree.

I used 20 percent, deducted that from the $3,000, derived a net of $2,400. I then deducted its foreign sub publishers' share, be it an independent or a subsidiary of the Big Seven, estimating that at 50 percent based upon the fact that at least the subsidiaries of Big Seven, 50 percent kept at the source and I don't know what the others are.

Deducting that 1200 from the 2,400, I get a net

additional royalty to Big Seven in the States of $1,200, deducting the derived over payment on the domestic of $800 I get a net of $00 less a writer's share of 50 percent of $200 which leaves a net figure of $200 to the Big Seven.

I ran through that fairly quickly.

Q Can you describe in a little more detail, beginning with the foreign --

THE COURT: What is the difference between your analysis and Mr. Zucker? I know there are a lot of them. If I sat and compared 301 with DX I would have all the differences in your approach of what?

THE WITNESS: You would have to infer them by seeing what I did and he didn't do.

Q Can you describe the difference?

THE COURT: Wait.

301 is the claim of Big Seven for lost mechanical royalties?

MR. SCHURTMAN: Domestic only.

THE COURT: Where is the thing that has domestic and foreign?

MR. BERGEN: That's 302.

MR. SCHURTMAN: 302 is the basic claim, your Honor.

THE COURT: All right. Let's just go down and

compare.

MR. BERGEN: Do you want Mr. Strauss to commence at the top?

THE COURT: Give me just a second.

All right.

THE WITNESS: PErhaps I can get to my figure of $3,320 simply by taking Exhibit 301 which is 10,160 and reducing that by an additional 342,000 units --

THE COURT: Wait a minute.

Mr. Zucker has not included any credit for royalties from Ya Ya on Walls and Bridges?

THE WITNESS: That's correct, your Honor. And if he did, if he had given credit for that, he would have ended up with $3,320 instead of 10,160.

THE COURT: Just a second. I'm trying to take notes.

Wait a minute, let's start over.

The point is that Big Seven acknowledges that it has gotten royalties from Ya Ya on Walls and Bridges even though it claims Ya Ya was not in the proper form. That's why you have a zero or a blank in 301. That is not a claim for lost mechanical royalties.

MR. SCHURTMAN: That is right.

THE COURT: Okay. What have you done about Ya Ya?

He is not making any claim.

THE WITNESS: No, but I have also given credit to Lennon for the royalties earned on Ya Ya and Rock and Roll, which they neglected to do.

Once that figure is considered it would reduce Mr. Zucker's schedule, Exhibit 301, to $3,320. If your Honor wants me to explain that --

THE COURT: Just a minute.

What is so difficult? I wish this could somehow be on a comparable basis because I cannot spend all year on this.

THE WITNESS: I appreciate that.

THE COURT: I don't know why you could not take Mr. Zucker's schedule and use the same format. You are saying a lot of the same things and some different things.

THE WITNESS: If I may recast then, your Honor.

If I take the $10,160 that Mr. Zucker has in Exhibit 301 and deduct the royalties on Ya Ya in Rock and Roll of 342,000 units at 2 cents, the dollar figure is $6,840.

THE COURT: What did you do?

THE WITNESS: I took the 342,000 units sold of Rock and Roll and since Big Seven has received royalties on Ya Ya of 2 cents a sale, it has received royalties of

$6,840 on Ya Ya in the Rock and Roll album which Mr. Zucker has not considered. He just considered Ya Ya in Walls and Bridges.

THE COURT: So you would --

THE WITNESS: Reduce his figure.

THE COURT: Reduce it 10,160 by --

THE WITNESS: $640. That leaves a balance of $3,320.

THE COURT: What is the reduction?

THE WITNESS: $6,840.

THE COURT: And the result is --

THE WITNESS: $3,320.

THE COURT: Then from that you take off the Harry Fox commission?

THE WITNESS: Correct.

THE COURT: Which is?

THE WITNESS: 3-1/4 percent.

By the way, as of February 1, 1976,it went up to 3-1/2 percent, but I utilized 3-1/4.

THE COURT: Then we are down to 3,200. Then you have another $4,000 for royalties that would be earned on --

THE WITNESS: Rock and Roll.

THE COURT: Two songs, right?

THE WITNESS: That is correct.

THE COURT: What I am trying to think of, and I know it is a stupid thing, but why is this a subtraction -- just explain how the 100,000 thing works.

THE WITNESS: What I'm saying in effect, your Honor, is that on a theoretical basis the Rock and Roll album which sold 442,000 units, the actual 342,000 plus the 100,000 that you found last week. But I broke that into two sections. If I had 442,000 units above it would have shown that Big Seven received, considering the extra 100,000 units, more this way than if all three songs were in Wall and Bridges.

THE COURT: So you give Big Seven royalties on Ya Ya and you can't catch me in another 100,000?

THE WITNESS: Yes.

THE COURT: A hundred units of Rock and Roll?

THE WITNESS: Yes.

THE COURT: That is money that would be owed by —

THE WITNESS: Would be owed, it seems to me, as I understood your ruling last week, your Honor, would have been owed by Adam VIII or Morris Levy to his Big Seven Music.

THE COURT: No. It is the other way around. In other words, if Capitol is putting out a hundred thousand more records, they owe royalties to Big Seven so you got to put the $4,000 there.

THE WITNESS: I should not have said Morris Levy or Adam VIII; I stand corrected on that. But since Capitol's figures, as I understood, were figured on a net profit basis after deducting all --

THE COURT: The hundred thousand is just a number of units sold.

THE WITNESS: Correct, sir.

THE COURT: You got a claim by Big Seven against John Lennon for damages.

THE WITNESS: I am mitigating those in this case, your Honor, by saying that Big Seven would have received royalties of 442,000 units, except for the fact that Adam VIII did what it did do without getting involved

in the whole course of this trial, and, therefore, since Big Seven would have received royalties of 442,000 units on Rock and Roll, they, in effect, theoretically received a greater amount that way than on the 425,000 units of Walls and Bridges.

MR. SCHURTMAN: I will make believe I didn't hear it.

THE COURT: Look, we can take up a lot of time. Mr. Schurtman, what are you claiming?

MR. SCHURTMAN: Your Honor, if you want to deduct $4,000, then, obviously, we don't want the same back on the other side. But what this witness has done, as I read his computations, he has assumed that somebody is going to pay us $4,000 on the damages that you awarded on the additional 100,000 units.

THE COURT: We have not awarded that.

MR. SCHURTMAN: I don't think it is going to be a credit. Nobody is going to pay it to us, because that song was never included.

THE COURT: Are you claiming to be entitled to some amount of royalties on another hundred thousand albums or units?

MR. SCHURTMAN: No.

THE COURT: No, I would not think you would,

and,therefore, I don't see any basis for this.

THE WITNESS: Can I explain my theory? I don't want to belabor the point. My approach was, suppose there was a completely independent publisher that was involved and he became a party defendant in this action, and assuming the facts you ruled on last week, wouldn't that publisher have received an award of two cents a song for 100,000 units from Adam VIII and Morris Levy as part of its damages, because if Capitol had sold the record, although Capitol would have paid the royalties, since Capitol's damages is the award to Capitol and was based on its net profit, wouldn't the wrongdoer have to pay the royalties to that publisher?

THE COURT: If it was in your claim, maybe it would.

THE WITNESS: That is correct. I was thinking since Big Seven is a company that is, as I understand it, owned by Morris Levy, even though he was not claiming it, it should be considered in this situation to reduce any damages he would get or Big Seven would get.

THE COURT: I am going to strike that out. Maybe I am going too fast, but I just can't understand that.

THE WITNESS: Then I will strike out the

$4,000 and leave the $3,200. Excuse me, I crossed it out on this exhibit. Is that all right?

THE COURT: Yes, please.

THE WITNESS: Then I will leave the balance before Writer's share of $3,200.

THE COURT: Let us go down to the foreign. You have just taken the 19,893 from Exhibit 302?

THE WITNESS: Yes, sir. I have deducted the foreign royalties on Rock and Roll from Ya Ya for the same reason that I deducted it on the domestic schedule of Mr. Zucker's, when I went from $10,160 to $3,320, because they actually earned that money on a second song on Rock and Roll, that second song being Ya Ya. So they received $16,872 from Ya Ya on Rock and Roll. So that reduces the damages on the Walls and Bridges. That left a difference of $3,021 -- shall I repeat myself, your Honor?

THE COURT: Yes.

THE WITNESS: Then I adjusted the net difference, since both schedules of Mr. Zucker's neglected to adjust the foreign royalties downward, because the royalties received by the publisher, the foreign publisher, would have been less due to the fact that he neglected to consider the packaging deduction and the agency collection

fee in each country, I reduced it by an estimated 20%, or $600 of the difference. That left a remaining balance of $2,400 for foreign royalties. I then reduced that figure by the foreign sub-publisher's share, be it an affiliate or an independent sub-publisher, because as I had understood this, while I was working on it, Big Seven was the party, and not necessarily foreign companies, either, 100% or 50% affiliated.

THE COURT: How did you get the $1,200 for the foreign?

THE WITNESS: I estimated 50%.

THE COURT: 50% of what?

THE WITNESS: Of the net difference, $2,400, $3,021, less $600.

THE COURT: The sheet I have has got some handwritten notations. Let me see that exhibit.

THE WITNESS: I admit it is not completely distinct. I was working on it a few minutes ago.

THE COURT: What is the $2,400?

THE WITNESS: The $600.

THE COURT: I see, it is that little figure.

THE WITNESS: Yes.

THE COURT: Now, in order to get the net, you take out the $4,000 on this 100,000 unit.

THE WITNESS: I then would end up with a net of $4,400, less the writer's share of $2,200, leaving a balance to Big Seven, which is the bottom line unlabelled of $2,200.

BY MR. BERGEN:

Q I show you Plaintiffs' Exhibit 303A. Can you point out in summary some of the items that have been omitted from 303A?

A Yes, in calculating the gross sales, Mr. Zucker utilized the retail list price of a disc and stated before that there could have been an increase on that figure because he ignored tapes. However, in most territories the royalties on tapes are based upon the same list price as that of discs, and the disc retail list price is normally reduced in most territories by a packaging allowance, and also in some countries by taxes imposed upon the, normally, wholesale or manufacturing value, the value added tax in many countries.

THE COURT: What are the deductions from gross sales price again?

THE WITNESS: Packaging allowance and the taxes, mostly the value added taxes or, come out of the taxes in some countries, which, as I said in most countries are based upon the disc price. Then in most countries there

are collecting societies analogous to the Harry Fox office, but their collection fees are much higher, normally 10%, 15%, and the royalty rates, I know, are incorrect in Japan. At one time the Japanese royalty was 7.2 yen, and until 1971 that worked out to exactly two cents based on the conversion rate. Since then, with the devaluation, it is slightly higher than two cents per song, and beginning in 1975 a new copyright law went into effect, and my understanding was that that was approximately a 5% royalty rate, not 8%.

There are some others, and I believe that the rates may vary slightly, but they would be insignificant in the final calculation.

I question Australia and New Zealand being one-half per cent. My understanding is it is five per cent.

THE COURT: What else?

THE WITNESS: Well, then, after whatever adjustments they may work out in actually quantifying the amounts, the gross royalty figure should be reduced by the foreign sub-publishers, and again, certainly, the independents, and depending upon your Honor's ruling as to whether the affiliated or subisidiary publisher should be considered both as part of Big Seven or not, those figures should be adjusted as well, and, certainly, a

50% affiliate is not accountingwise a subsidiary, and under sound accounting principals cannot be consolidated. So I can't see how a 50% affiliate can be considered as such, anyway.

Q Is there anything else on schedule 303?

A Not that I can think of offhand.

Q You have already done in the other schedule, going through the other schedule, you have reduced, or is there some way you can reduce the final gross royalty figure that appears on 303?

THE COURT: Haven't you done that? You have made these deductions.

THE WITNESS: I have done it essentially in VX, just working with differences, because the result would be the same approximating figures.

Q Now, directing your attention to Plaintiffs' Exhibit 201, which is the schedule covering Oye Con 'O Va, can you go through that and analyze that and analyze that schedule?

A Yes.

THE COURT: What are you dealing with now?

THE WITNESS: 201, Oye Con 'O Va.

The first figure that I would question or would remove, again depending on how your Honor feels, is the

foreign subsidiary of Big Seven, since they are foreign companies, they are separate companies, and I question whether they should be included in the calculation of the earnings that are reflected in the lower right-hand corner of that schedule.

Q What figure are you specifically referring to?

A I am referring to Line 40, the figure aggregating $33,826.

Q Go ahead.

A Also the figure should be reduced to a minor amount to the extent that it includes mechanicals and performances prior to June '71 when Santana's record was released.

Q You are referring to the figures above the line that starts with Santana?

A From line 1 to 16.

I also would like to point out that Santana being a CBS artist enjoyed the advantage of what probably is one of the largest world-wide record company organizations in the world, and that is CBS, their marketing ability. That also includes the fact that CBS is through its record club division undoubtedly moved a tremendous amount of Santana product and I respectfully disagree with Mr. Zucker that the same would happen to Mr. Lennon, because Mr. Lennon's product is sold through Capitol Records and Capitol Records does not have its own record club nor does it have a license with the CBS Record Club.

THE COURT: Doesn't Capitol have a marketing organization?

THE WITNESS: Not within the record club field, sir.

THE COURT: Go back to item 1. You said Columbia had world-wide marketing.

THE WITNESS: Capitol does with EMI.

There is a question whether the EMI Capitol complex is larger than CBS. CBS seems to feel that it is number one in the world.

THE COURT: You said that Columbia had world-wide marketing as if I was supposed to assume that Capitol and EMI were just out in Wichita or something.

THE WITNESS: Not at all, sir.

THE COURT: They market worldwide?

THE WITNESS: Yes, they do. I wasn't trying to demean EMI by any means. It's just that CBS feels it is number one and that it is a larger operation than EMI. This I cannot say. But turning to the second point, the record club operation Capitol does not -- the only record club that Capitol was in was a record club called Capitol Record Club, but which was not owned by Capitol since 1969 or 1970 and that club ceased operations in December of 1974.

THE COURT: All right.

THE WITNESS: So that effectively there was no record club market for Lennon's product.

Q What else can you point out with respect to Plaintiff's 201? Maybe we have gone into this enough already but what about the fact that the figures include items in addition to the Santana direct mechanicals?

A There is no allocation about how much direct revenue is derived by Santana.

THE COURT: I got that.

Q Referring to the other exhibits, Mr. Strauss, 202, 203 and 204, which refer to Maybe, Daddy's Home and My Boy Lollypop, are the same things true?

A With respect to Maybe, yes, Janis Joplin was a CBS artist who therefore had the same advantages that Santana did.

THE COURT: Which one?

THE WITNESS: The song "Maybe."

I believe that is 203.

MR. BERGEN: Yes, 203.

A With respect to Daddy's Home, Germaine Jackson, he is a Motown Recording artist, also Motown had a licensing agreement with the Columbia Record Club so that that product also enjoyed the marketing advantages through the record club.

My Boy Lollipop, all I see with respect to Maggie Maye is some foreign earnings in the last half of '75, nothing substantial for domestic, so I have nothing to say about that really.

Again, with respect to all four of these the same comment that has been made several times that there is

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no allocation or break out as between --

THE COURT: Let me have that. Also the same treatment of the foreign?

THE WITNESS: Yes.

THE COURT: Go ahead.

Q Mr. Zucker gave some testimony about the Harry Fox Agency and its commission. Can you respond to that?

A Yes, I can.

Our firm does the auditing of the record comapnies for the Harry Fox Agency. Up until approximately 1970 for many years prior thereto, I should say, the commission was 3-1/2 percent. From 1970 to February 1, 1976, it was 3-1/4 percent and it is now 3-1/2 percent.

In about two --

THE COURT: What are we now addressing?

THE WITNESS: The Harry Fox commission of 3-1/2 percent. For the period of time it was 3-1/4 percent, roughly six years, in approximately two of the years for a period of time of two or three months the Fox Agency waived its 3-1/4 percent commission because the revenues were far in excess of its costs, so rather than deduct it and then issue a rebate, this is the way they passed the saving onto the members, one of whom is Big Seven.

To that extent there was a benefit for approximately

two of the six years and only for those two years, as I understand it.

Now, as I said, it is up to 3-1/2 percent. Based on the budget of the copyright laws, the copyright law is not revised to increase it to 2 cents and that may even go up to a larger figure later on.

Q Directing your attention to Plaintiff's Exhibit 205, which is the final projection schedule, can you comment with respect to that, please?

A Well, I noticed that Mr. Zucker -- the top part of that schedule shows an average of 96,500 with a high figure of 179,000 and a low figure of 41,000. I was very much surprised to hear Mr. Zucker say that the low figure was 96,500 rather than the average. It seems the average is 96,5 and the low is 41,000.

THE COURT: All right, we have that.

Q Did you have occasion to review certain of the books and records of Big Seven, Mr. Strauss?

A Yes, I did.

Q Do you recall when that was?

A Not the exact date. I believe it was in early March.

Q Can you tell us or can you tell the Court, what books and records you reviewed?

A Yes. I spent most of my time examining, I guess you could call it the royalty earnings by song. Perhaps Mr. Zucker so that we don't get bogged down in nomenclature or semantics, royalty earnings by song, and I concentrated on the songs Ya Ya, Angel Baby and You Can't Catch Me.

I also asked for some sampling of royalty statements to test into some of those figures and I also asked for some BMI performance statements.

Q In reviewing those documents of Big Seven, did you have in your possession at the time Defendant's Exhibit DW?

A I did.

Q The schedule that Mr. Zucker said has been supplied by him?

A I did.

Q Did you make certain notes on that schedule or the copy of the schedule that you had?

A Yes, I did.

MR. BERGEN: Would you mark this?

(Defendant's Exhibit DY marked for identification.)

A I penciled in some --

Q Excuse me. I think I added some other schedules to that.

xxx

A All right.

Then, in addition to what the schedules that I worked from that were furnished to us, I prepared on work sheet form with respect to the same three songs, Ya Ya, You Can't Catch Me and Angel Baby, a listing of the total mechanical income for the last five years in semi-annual breakdowns because that is the way they accumulate it, semi-annually, and spread across royalties from those record companies that paid a relatively substantial portion of the total.

That part of what has been stapled to this exhibit.

Q I think there is one page that is a duplicate here.

A It should be six pages.

MR. BERGEN: This is Defendant's Exhibit DY, your Honor.

THE COURT: Whose records are these? Are these schedules you made up?

THE WITNESS: Two pages labeled "Domestic Performance Income" were schedules that they furnished us onto which I have penciled additional information.

THE COURT: This is really impossible to deal with. It is unreadable. Is there an original?

MR. BERGEN: Your Honor, I have a larger copy. Well, let's substitute these.

Q Mr. Strauss, can you describe Defendant's DY?

A Yes.

Q Explain what it shows, please.

A Yes, I shall try to do so.

With respect to the domestic performance income schedule which is the first two pages, the dates were inserted by Zucker or somebody under his control. The figures in the next two columns marked Ya Ya performances and amounts were supplied to us by Big Seven.

THE COURT: Let's just take it calm. We have some dates and I take it that is quarter ended.

THE WITNESS: Yes.

THE COURT: You have Ya Ya. I have two columns, one headed "Performances," and one "Amount." What are they?

THE WITNESS: Performances is the number of performance credits that BMI allocated to Ya Ya for those--

THE COURT: Do you get a royalty per performance or what?

THE WITNESS: Unfortunately --

THE COURT: Where is the income?

THE WITNESS: The amount column is the dollar column.

THE COURT: In some there is no income missing.

THE WITNESS: Because they combine two, three month periods to get it.

THE COURT: Okay. I've got a pencil copy in a pencil column a little ways over in the page.

It says "Total" and then there is a column "Mechanical" and then there are some words in pencil which I can't read.

THE WITNESS: Angel Baby -- well, that refers --

THE COURT: I really see no excuse for submitting an exhibit which cannot be read. There are typewriters and accountants -- I have seen a lot of accountants'work papers more readable than this.

THE WITNESS: I didn't realize we were going to go back into the early years with respect to some of the earnings and I extracted this information in case it was necessary and I did not realize until yesterday that we would be going into these old years to show the earnings of mechanicals.

MR. SCHURTMAN: Are we going into these old years? I question the relevance of going into these old years.

THE COURT: Couldn't we do this, Mr. Bergen:

I think it is very relevant to have the earnings

record, information about the earnings record of these songs. I take it what you are trying to get at is to see whether there is comparability or no comparability between these songs and the examples that the plaintiffs used. That is certainly useful but isn't there a way to have it? This is going to get into the record and I am going to have to look at it and maybe some appeal judges will have to look at it and it is a little difficult.

THE WITNESS: When I say, your Honor, when I was over at Big Seven we asked them if they would bring their original records from which this data was taken to court and they said yes.

Whether they have brought it or not, I don't know.

THE COURT: What do you really need to show?

MR. BERGEN: We need to show -- why don't I ask Mr. Strauss just one question. Based on his review of the records and the preparation of these schedules, what does or what do the records, with respect to Ya Ya, You Can't Catch Me and Angel Baby, show with respect to mechanical income and performance income?

THE WITNESS: It shows that when a substantial artist recorded any one of the three songs for a period of time there was an increase in earnings occasioned by that recording, royalties generated -- the record company that

that artist is under contract that is -- and after that record tapered off there was no substantial generation of income from others.

THE COURT: Couldn't you do this:

These schedules that Big Seven put in by Oye Como Va and so forth, what they have is I guess annual, but it is not just endless amounts of figures, income before of the thing, and they list Santana and they have the income after. I guess this is basically what you're trying to do here.

THE WITNESS: That is correct, sir.

THE COURT: Where is it that you show, say, a recording by a major artist?

THE WITNESS: Well, under Ya Ya, between June 30th '64 and December 31, '64, Bobby Freeman recorded or a license was issued --

THE COURT: Do you show that here?

THE WITNESS: No, I just interpolated that from the song sheets and there was a substantial increase in the mechanical income which is column 4.

THE COURT: A substantial increase from what?

THE WITNESS: From $1,500 up to 6,500 and then it went down to 1,600 and it dropped down to 700, 500 and 600, rounding off.

jqlt 12 Straus-direct

THE COURT: I have to tell you that it is somewhat difficult to pull all of this together. You have a lot of testimony about this and the exhibit with other things. Why couldn't you get up an exhibit showing the income and just put a note "Freeman recording" or whatever, at the side, and I can look down this and get the idea and it won't get lost.

THE WITNESS: I will be delighted to do that, but we have to work out a time schedule.

THE COURT: We are not ending the case this afternoon, I guess. Why don't you try to present your point and we can get the exhibit straightened out.

MR. BERGEN: Okay.

Q Can you point out, Mr. Strauss, the same point you made with respect to Bobby Freeman on You Can't Catch Me --

THE COURT: Let's go back to Ya Ya for a minute. The general story on Ya Ya, you tell me and we will get it in the record.

Ya Ya was originally recorded when?

THE WITNESS: I have to look at the song sheet, your Honor.

THE COURT: Okay.

Let's take a short break.

(Recess.)

MR. BERGEN: May we mark this?

(Defendant's Exhibit DZ marked for identification.)

Q Mr. Strauss, I hand you Defendant's Exhibit DZ and I ask you to describe what that is.

A Yes, this is a schedule I just worked up from the other schedules, listing the mechanical income, domestic mechanical -- excuse me, total mechanical income from You Can't Catch Me, the song, You Can't Catch Me, from June 19th -- for the six months --

THE COURT: You want to do You Can't Catch Me rather than Ya Ya?

MR. BERGEN: Yes, your Honor.

THE COURT: You do?

MR. BERGEN: Yes.

THE COURT: All right.

A So, the mechanical royalty income --

THE COURT: Could you give me just a little chronology, do you have that, when that was first recorded? Maybe we have that in the record now.

THE WITNESS: It is part of the song sheet listing but I will be delighted to.

MR. BERGEN: The song sheet indicates that it was recorded first in March of 1957, by Chuck Berry.

THE COURT: We had that this morning, I'm sorry. All right.

A I listed the mechanical income in six-month periods from the period ending June 30, 1965 through December 31, 1975.

THE COURT: Is this one that was a re-recording by somebody, or wasn't there -- this is the Rolling Stones?

THE WITNESS: That is correct.

THE COURT: We had that earlier, but give me that again. When did they record it?

MR. BERGEN: January '65, your Honor.

THE COURT: Do you have the income between '57 and '65?

THE WITNESS: No, I do not, sir.

MR. BERGEN: It was not supplied to us. They apparently did not have the figures, your Honor.

THE COURT: Is that right, you don't have figures?

Mr. Zucker, you testified that Big Seven bought the song in '65?

MR. ZUCKER: I really can't tell from this.

THE COURT: I will take it you have no earnings figures before '65, is that right?

MR. BERGEN: That is correct, your Honor.

MR. SCHURTMAN: The exhibit shows on its face that the copyright was assigned to Big Seven in February 1969.

THE COURT: That is Exhibit DS?

MR. SCHURTMAN: Yes.

THE COURT: In 1969?

MR. SCHURTMAN: Yes.

THE COURT: When do you have earnings figures for?

THE WITNESS: From the period ending June '65 through December '75.

THE COURT: What are those figures?

THE WITNESS: It's on this schedule, your Honor.

THE COURT: Give it to me.

THE WITNESS: Read off all the figures?

THE COURT: Do you have a total?

THE WITNESS: I didn't total it.

THE COURT: All right, this is DZ?

What is the notation at the bottom?

THE WITNESS: The bulk of the income is from Apple in Canada. It is obviously the John Lennon income.

MR. BERGEN: May I offer VZ in evidence.

MR. SCHURTMAN: I have not seen it.

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VOIR DIRE EXAMINATION

BY MR. SCHURTMAN:

Q Where did you get these figures that are on the sheet, Mr. Strauss?

A I got them from my work sheets, which were taken from the books and records of Big Seven Music.

Q These are simply the recap of your work sheets?

A Yes, sir.

Q Does that include domestic and foreign?

A Yes, sir.

Q Are you sure?

A Yes, sir, it includes -- let me rephrase it -- it includes all income that is posted to the royalty income by song, and I did notice that there are foreign royalties posted there, and it is my understanding that that is the ledger sheet that is used to calculate the writer's royalties. Presumably, it should have all the income, although it would only reflect the United States portion of foreign mechanical. Have I made myself clear?

Q So it would not include all foreign?

A It would not include the foreign sub-publisher's share. That is not indicated on those sheets, those work

sheets of Big Seven.

BY MR. BERGEN:

Q You are talking about the Big Seven documents that you looked at?

A Yes.

THE COURT: It does not illustrate much to me, and it is just a column of figures.

BY MR. BERGEN:

Q Will you describe what Exhibit DZ illustrates with respect to the Rolling Stones' recording and thereafter?

A Yes, it shows that in the beginning with the first Rolling Stones release, and there were apparently more than one, because there are several licenses issued in connection with the Rolling Stones' rendition --

Q You are referring now to Defendants' Exhibit DS?

A Yes, there was one in January, 1965, one in June of 1965, one in October, 1966, all Rolling Stones. In a quick look that is all I can see. There is one February, 1969 also. Excuse me. That income was in the low four figures for a period from June, 1965 through June, 1968, the bulk of which was earned by the Rolling Stones recording, because I had some parenthetical notes on one of the work sheets showing the revenues from London, Ampex and Nanker-Phelge.

Q What are those three companies?

A They were three record companies or tape companies that released the Rolling Stones product, so that by my marginal notes I could determine that the bulk of the revenue in this period of time came from the Rolling Stone releases, one or more of the licenses.

THE COURT: I am going to ask you, Mr. Schurtman, as far as you can, we have this Rolling Stones recording in 1965. Were there cover records after that of any significance?

MR. SCHURTMAN: There were some limited cover records by the Blues Project, Love Sculpture, and I think there was one other, the Bar Kays. You heard some testimony on that this morning.

THE COURT: I just don't remember.

MR. BERGEN: There were three cover records until --

THE COURT: Let us get this. When were the cover records?

MR. BERGEN: According to Defendants' Exhibit DS, there was one by Sleepy LaBeef.

THE COURT: When?

MR. BERGEN: In November, 1965, Columbia Records.

The Blues Project was December 13, 1966.

There was another one in March, 1969, which we believe was also the Blues Project. So we think it is the same record probably.

THE COURT: Let us pass that.

MR. BERGEN: The Bar Kays in May, 1970.

Love Sc[illegible]ture, January 22, 1970.

And the next was John Lennon, February 13, 1975.

After that there was the Steven Stills, January 8, 1976.

THE COURT: Well, it is helpful to have that chronology. So you start out in 1957. Were there any cover records between 1957 and 1965?

MR. BERGEN: The sheet shows a license to Troy Shondell in December, 1964.

THE COURT: Does the song sheet purport to cover the period before the Rolling Stones?

MR. BERGEN: Yes.

THE COURT: There is no indication of any cover records before the Rolling Stones?

MR. BERGEN: Other than this Troy Shondell the year before.

THE COURT: Now, what point do you draw from all this, Mr. Strauss?

THE WITNESS: The point that I drew, your Honor, was that after the activity of the Rolling Stones tapered off, the income was relatively unsubstantial.

THE COURT: What was the period of the Rolling Stones income?

THE WITNESS: Up to June of 1967, essentially, or December of 1966, perhaps.

THE COURT: And it grew from what to what?

THE WITNESS: Well, it started at roughly $1,500, and then the largest amount was $3,100.

THE COURT: Per what?

THE WITNESS: For a six-month period, and that is all before the writer's share.

THE COURT: The top was what?

THE WITNESS: In the six months ending June, 1966, $3,107.

THE COURT: $3,100?

THE WITNESS: Yes, sir.

THE COURT: And then it tapered off?

THE WITNESS: It fluctuated in the low four figures, $1,750.

THE COURT: But it went off from the $3,100?

THE WITNESS: Yes, it went off.

THE COURT: Was it between $1,000 and $2,000?

THE WITNESS: Per six-month period through June, 1968.

THE COURT: Between $1,000 and $2,000?

THE WITNESS: Yes, sir. After that peak figure that I mentioned earlier of $3,100 -- between $1,000 and $2,200, to be precise, your Honor.

THE COURT: Until when?

THE WITNESS: June, 1968.

THE COURT: Then what happened?

THE WITNESS: Then from the period ending December 31, 1968, through December 31, 1974, it was in the low to middle three figures.

THE COURT: You are talking about $500?

THE WITNESS: Yes, $500 or less, except for three periods, when it was about $1,300.

THE COURT: Then you have the Lennon recording?

THE WITNESS: Then you have the Lennon recording.

THE COURT: What did that produce?

THE WITNESS: In June, 1975, $7,400, and in December, 1975, $1,600.

THE COURT: June, 1975, was what?

THE WITNESS: $7,400, in December, 1975, $1,600.

THE COURT: You have not got the Steven Stills results?

THE WITNESS: That was just released this year; that was a Canadian license.

MR. BERGEN: Your Honor, we have not had time to go through and do more or less the same thing on Ya Ya and Angel Baby. Maybe Mr. Strauss could --

MR. SCHURTMAN: Mr. Zucker has prepared a detailed sheet on Ya Ya. Would you like Mr. Strauss to use that?

MR. BERGEN: When did he prepare it?

MR. SCHURTMAN: It gives the earnings history on Ya Ya.

MR. BERGEN: Mr. Strauss, look at it.

THE WITNESS: I have some difficulties, because the figures I worked with just reflect the domestic portion of the foreign, and I do not believe Mr. Zucker's figures shows that.

Is that correct?

THE COURT: I am going to suggest this: We have some loose ends. Now, Mr. Strauss and Mr. Zucker, the kind of chronology, whether it is testimony or statistical writeups, statistical writeups in some clear typewritten form, the kind we went through on You Can't Catch Me, would be very helpful, the original recording date, income before certain event, what the event is, when the cover

records occurred, and what the income was -- let us call it the main record and then the cover records. You know what we are talking about.

THE WITNESS: I believe so.

THE COURT: For those three songs would be helpful.

Also, Mr. Schurtman and Mr. Zucker are getting the breakout that we talked about. Now,none of that can really be finished this afternoon, I would appreciate you working on that and I will see how my schedule goes and I would like to somehow be able to get a report from you early next week that this work is done, that you are ready to present a completion of the evidence. If we get all that worked out, couldn't we do it in a half a day or something like that?

MR. SCHURTMAN: Will Mr. Strauss be available for cross-examination?

MR. BERGEN: He is leaving for England.

THE WITNESS: I am going to be in England for a week, and then when I come back following the week of April 26th, on the afternoon of the 27th I must go to Los Angeles for the balance of that week, and then the following week, in the middle of the week I have that International Music Industry Conference, in which I am

chairman of a panel, and that is going to tie me up from the middle of that week to the middle of the following week, which is May 12, except for those few days in between.

MR. BERGEN: Would it be possible to come in for an hour or so on that Monday, 26th, so that we can have next week to put the schedules together?

THE WITNESS: For an hour or two.

THE COURT: We have got to do it. We will just do it. We could go on tomorrow morning, but we are not even halfway finished. You have got to get this work done. So I think it would be better to try to work it in the following Monday. We will leave it at that.

MR. SCHURTMAN: The 26th, then?

THE COURT: We will just have to work something in. I have a trial that day, but we will have a short session and manage somehow. Mr. Strauss will be here then, the 26th?

THE WITNESS: If all the planes make it. I would appreciate to know the schedule so I don't have to spend time sitting in the courtroom.

MR. SCHURTMAN: We will put you on as the first witness.

THE COURT: Then what other proof is there?

MR. SCHURTMAN: We will put in those breakouts

that you requested. Mr. Zucker is preparing them.

THE COURT: Why don't you do this: Call my chambers when you got the rest of the documents ready and just let us come down and see what we can do. When we have witnesses here that Monday it is going to be very tight. Maybe the lawyers can come on down sometime late next week, offer your schedules so that we have everything in order, so that we are not coming in Monday and finding out we don't have what we need to finish the witness. But you call me when you are ready to come in. We will adjourn now.

MR. SCHURTMAN: I will count on the 26th.

We do have some other loose ends. I want to ask you about them. I spoke to Mr. Prettyman yesterday about those Canadian figures and I told him you would like an explanation.

THE COURT: He sent me a letter which I have not read.

MR. SCHURTMAN: I have not seen a copy of it. But just let me point out the significance.

If the income of the Canadian sales were under $30,000, as these royalty figures show, instead of 65,000, it is not just a matter of recomputing. What it means is that the Canadian projections on which you relied are

false, because I have figured out, using the same statistical projections, where you were told the United States sales should have been 520,000, I come up with United States sales of 240,000. In other words, if the royalty figures that we obtained from the Harry Fox Agency are correct, then all of the statistics that were furnished to your Honor on Canadian sales are completely false, and, in fact, go the other way. That is the real significance, because it would have a bearing not only on your computation of damages, but on your entire approach to the case.

THE COURT: You have a right to argue that. I don't know what to make of it.

MR. SCHURTMAN: It is more than a right to argue. At the moment, unless Mr. Prettyman has a satisfactory explanation for the discrepancy, I am taking the position that some sort of fraud has been perpetrated on the Court.

THE COURT: He is not here.

MR. SCHURTMAN: I am not accusing him.

THE COURT: I tell you that I am perfectly prepared to go into that.

MR. SCHURTMAN: When do you want him to come and explain himself, explain the exhibit? Shall we do it on the 26th, too?

THE COURT: The 26th I know that I have a trial.

Now, maybe what we could do is set a meeting for next week -- I don't want to set it right now -- I don't know when you will be ready, but I am assuming that sometime next week we can set a meeting, we could make sure that we have all the necessary exhibits and facts and data for Monday's session, so that we can definitely finish with this witness and all other witnesses hopefully. Now,if you want to, tell Mr. Prettyman we are going to set a meeting, we have not set the date and time.

MR. SCHURTMAN: Could we set it for the 21st?

THE COURT: What about the 21st? Let me check on that. I would be perfectly willing to see you then, and I think I should.

MR. SCHURTMAN: I have other hearings on other days.

THE COURT: Then you are going to talk about whether you are going to think through this problem and discuss it with the lawyers, the problem of whether the right method of calculating damages was used in connection with deductions for --

MR. SCHURTMAN: AFTRA.

THE COURT: -- that kind of thing, the subject we talked about this morning, that need to be considered, and that, of course, will effect the theory and calculation

of any damages that are awarded to you here. There must be a right way to do it.

THE COURT: What is the 21st?

MR. SCHURTMAN: Wednesday.

THE COURT: I can do it at 4:30. I am assuming you can get ready.

Mr. Bergen, can you get ready the materials you need without Mr. Strauss?

THE WITNESS: As I understand it, your Honor, you were asking me to prepare something similar to this for the two other songs?

THE COURT: That really is not of much help. I told you I thought what I need that I can work with is the kind of exhibit that the plaintiffs have. It shows from the original recording on, it has got a column and headings and so forth. I know then what I am dealing with. Now, you may say that it is wrong, but, at least, I know what they are telling me.

THE WITNESS: I know what you are saying. I do see a problem in trying to do this tomorrow, because that is the only day I can do it prior to the 26th.

THE COURT: I have to finish this case, and if they have to get another accountant, they have to get another accountant. Maybe it can be done with Mr. Zucker's

help.

MR. SCHURTMAN: We will make him available.

THE WITNESS: It comes from their books and records.

THE COURT: It does not require your attention if Mr. Zucker and Mr. Bergen can work it out. It is just a matter of laying it out.

THE WITNESS: I shall appreciate that, your Honor.

MR. SCHURTMAN: You awarded damages on 30,000 units on something called International Finished Goods. I have searched the record in vein. I find nothing on that.

THE COURT: We will take that up.

MR. SCHURTMAN: Finally, your Honor, you had directed Mr. Bergen and Mr. Marsh at one point to give us his Newsday review of Rock and Roll. You made that direction from the bench, that it be made available. We have not yet received it, and I would like to put it in the record at some point. Somebody may want to read it.

MR. BERGEN: Mr. Marsh said he was going to look for it. I have not spoken to him since.

THE COURT: I don't regard that of tremendous consequence, but you have the right to get it and have it

in the record.

You have brought up the points which need to be considered.

MR. SCHURTMAN: One question, did you get my brief on this phase of the case?

THE COURT: Yes. I just think everybody ought to leave this room with all of these topics in mind, because we have to wind this up and get the loose ends covered, and we will try on that meeting on the 21st to do the best we can to cover them. I hope Mr. Prettyman can be here.

MR. BERGEN: Where will it be?

THE COURT: In this room.

[Whereupon, an adjournment was taken to Wednesday, April 21, 1976, at 4:30 p.m.]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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BIG SEVEN MUSIC CORPORATION, et al.,

Plaintiffs,

vs. 75 Civ. 1116

JOHN LENNON, et al.,

Defendants.

----------x

Before:

HON. THOMAS P. GRIESA,

District Judge.

April 21, 1976
4:30 p.m.

APPEARANCES:

WALTER CONSTON SCHURTMAN & GUMPEL, P.C.
Attorneys for plaintiffs
330 Madison Avenue
New York, N. Y.
BY: WILLIAM SCHURTMAN, ESQ.,
ALAN KANZER, ESQ., of counsel.

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, ESQS.,
Attorneys for defendants John Lennon and Harold Seider
BY: JAMES M. BERGEN, ESQ., of counsel.

APPEARANCES (Continued):

HOGAN & HARTSON, ESQS.,
Attorneys for defendants Capitol Records
BY: E. BARRETT PRETTYMAN, JR., ESQ., of counsel.

ARROW, SILVERMAN & PARCHER, P.C.
Attorneys for Balsam & Fox Agency, Inc., etc.
BY: ALAN SHULMAN, ESQ., of counsel.

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(In open court)

THE COURT: As I understand it, we have an agenda this afternoon which is mainly a conference to make sure that we are in order to finish up this case next Monday when the accounting witnesses were here. As I understand it the open points are as follows:

We have the question raised by Mr. Schurtman about whether Capitol-Canadian sales figures previously presented. We have the question about whether there is anything in the record to support the foreign sales figures which I relied on in granting damages. We have the question about the breakdown of those royalty figures on the exhibits showing the exhibits relating to the value of the copyright.

Do you remember, Mr. Schurtman?

MR. SCHURTMAN: Yes, your Honor.

THE COURT: We have a question of whether there should be any further deductions from anybody's damage award to get the damage awards down to net figures. We have the question of the second stage of the come together settlement, and those are about all the loose ends I can think of. Anybody have anything else?

MR. SHULMAN: I am appearing on behalf of

the Harry Fox Agency, ATV Music and Maclen Music in response to subpoenas served on my clients. I have petitioned with respect to the Fox Agency subpoena and the oral application with respect to the other two and have supporting affidavits on both.

THE COURT: What is this about? Who subpoenaed Harry Fox?

MR. SCHURTMAN: We served subpoenas on the Harry Fox Agency, on ATV and on Maclen Music. That is the Lennon McCartney Publishing Company.

We really served them for two basic purposes. One was to get royalty statements in Canadian and domestic sales of Walls and Bridges and Rock and Roll in order for us to testify further the accuracy of the figures that Mr. Prettyman has supplied you with in view of the problem that has come up with the Canadian figures.

A completely separate purpose of the subpoenas was to check the cover records that had been issued on other John Lennon and Paul McCartney recordings to see what the experience has been with those cover records.

Now, I think it's to those subpoenas that Mr. Shulman is addressing himself to.

MR. BERGEN: I would first like to ask just what relevance is there to cover records on John Lennon and Paul McCartney songs?

MR. SCHURTMAN: The relevance I think is obvious. We take the position when an artist of the stature of John Lennon records a song that this generates cover records.

Now, we originally tried to prove it in terms of our experience with other artists. Mr. Bergen has sharply challenged our experience with other artists as not being relevant. It occurred to me perhaps the most relevant experience would be Mr. Lennon's experience himself.

MR. BERGEN: Not with his own songs. What Mr. Schurtman is talking about are songs that Mr. Lennon recorded of other artists. Therefore, I don't see what relevance it is of what the situation was following a John Lennon song or a John Lennon-Paul McCartney song.

THE COURT: I think that is pretty far afield.

MR. SCHURTMAN: Why is that far afield? If anything, the argument has been made here in the first phase of the counterclaims that when John Lennon

records somebody else's songs this should generate greater sales than when he records his own.

THE COURT: Look, I'm not permitting discovery to go on here. If you have a line of proof, if you know what you want to prove and you have figures and they have some bearing on the problem, sure you can put them in. But you don't really know yet, do you?

MR. SCHURTMAN: I have a pretty good idea when John Lennon records a song numerous other artists issue cover records.

THE COURT: A pretty good idea. At this stage of the game I am interested in having somebody come in with some well worked out proof and put it on very fast and in a clear form, in an admissible form. If you want to take the deposition of Harry Fox Agency or what do you wantto do?

MR. SCHURTMAN: I want the precise figures I asked for in my subpoenas. The schedules will demonstrate --

THE COURT: You want Harry Fox to make up schedules for you?

MR. SCHURTMAN: I wantthe existing schedules. Remember the song sheets we introduced on the various songs?

THE COURT: Sure.

MR. SCHURTMAN: Other people keep these copyright sheets too. We can show when John Lennon recorded a particular song all you have to do is look at the song sheet to see what additional licenses were issued on that same coyright. That is No. 1.

All you have to do is look at the royalty statements to see how much all these cover records earned.

THE COURT: Have you talked to the gentleman from Harry Fox?

MR. SCHURTMAN: Yes.

THE COURT: Does he have what you need?

MR. SCHURTMAN: He has the information in certain respects but the --

MR. BERGEN: I reiterate my objection.

MR. SCHURTMAN: Will you let me finish, please?

He has indicated to me that Harry Fox has a peculiar problem. Harry Fox acts as an agent for publishers. He feels as an agent he cannot disclose business secrets. I don't believe that is a tenable position in law.

THE COURT: That has nothing to do certainly

with John Lennon. Lennon is a party to this action.

MR. SCHURTMAN: Harry Fox does seem to have the information that we need. Now we have also subpoenaed Maclen Music, which is the Lennon-McCartney publishing company to get specific information from them. This gentleman apparently represents Maclen too. We have also subpoenaed ATV only because it was --

THE COURT: Who is ATV?

MR. SCHURTMAN: Another publishing company and it's our understanding, based on some testimony that was given in this trial that Maclen made the deal with ATV under which ATV took over the copyrights.

Apparently Maclen still has the copyrights from what Mr. Shulman tells me, so at this point we would be pushing the Maclen subpoena more than the ATV subpoena. We just wanted to make sure we got both ends.

THE COURT: As far as the relevance, the objection of Mr. Bergen, it's a little hard for me to deal with it at this point.

MR. PRETTYMAN: May I be heard, your Honor?

MR. SHULMAN: May I be heard about statements were made by Mr. Schurtman that are incorrect?

THE COURT: Yes.

MR. SHULMAN: What Mr. Schurtman has characterized as song sheets I really don't understand what that term means. I can tell you that the Harry Fox Agency on behalf of its principals will maintain copies of licenses that were issued on behalf of individual publisher principals. Each license separate. Royalty statements that would be received by the Harry Fox Agency would be received for each individual publisher which would contain a numerous amount of songs depending on how active that publisher's catalog was in terms of its use by a particular record company.

So that each line of information as to each particular song would be combined on behalf of each of the publisher principals in a long statement coming from each record company. That is one point and I wanted to make that clear.

Secondly, the Harry Fox Agency does function as a fiduciary agent of its publisher principals. What we have is a situation where there is a very competitive industry, and that is, music publishers have trade secrets and business secrets which tyey keep each from the other. The Fox Agency in a peculiar position in that it represents numerous, if not the majority of all of the music publishers including the plaintiff in this case.

Publishers, when they become affiliates of the Fox Agency, sign an agreement which in respect to the Fox Agency binds it to a privilege, in a sense, in that it will not disclose any information concerning the license procedures of its various clients to anyone else without the individual consent of the client.

What we have here is a situation where the Fox Agency is not a party to the lawsuit, where none of the principals from which information is being sought as to whose business records information is being sought via the Fox Agency, has been subpoenaed nor are they parties to this action.

What is being sought here could conceivably wreak serious havoc within the industry where trade secrets are important. The plaintiff in this action being itself a principal of the Fox Agency is mindful and its requirements that its business practice --

THE COURT: Let's forget confidentiality because that can be handled in a protective order. John Lennon is a party here. He is suing and being sued. His information has -- to the extent that any information about John Lennon is relevant to the case it gets disclosed.

MR. SCHURTMAN: John Lennon and the Fox

Agency have no privity except indirectly.

THE COURT: Just slow down a little bit. What are the records that are being sought from you that you had? You have the subpoena. Do you have records showing the cover records or copyrights, licenses issued on -- what would they be, the songs written by John Lennon?

MR. SCHURTMAN: Two separate aspects. One would be songs written by John Lennon.

MR. SHULMAN: You have it confused. You are talking about two different situations. You are confusing ATV and the Harry Fox situation. Harry Fox, what you sought to subpoena were the statements that were received by the Harry Fox Agency from Capitol Records with respect to sales of record albums in the US and Canada of the two albums, Walls and Bridges and Rock and Roll.

Now, there are numerous publishers in respect -- I forget which one it is because one of the two albums the Fox Agency did not license and has no information. The other album, the Rock and Roll album, has numerous publishers which the Fox Agency did license for. But each one of the statements that would have been received from Capitol Records in this instance

would have been a statement that would show for each individual publisher all of the songs that Capital Records used during a particular period of time for that publisher. It could be in each instance a huge royalty statement in which one song which they are seeking information on would be contained.

To say that it's burdensome is putting it mildly. That is not to say we could not comply.

I must seriously suggest to the Court that what is being sought --

THE COURT: I don't even understand what you are talking about. I just don't even understand. The thing is, this should have been done. We have been at this for about 15 minutes. We were supposed to have about an hour and clean up a few things and now we have a very complicated argument about a subpoena. I can't handle it tonight. That's all there is to it. You will defer the subpoena and we will get to some other things.

MR. SHULMAN: Can I hand up the affidavit?

THE COURT: I probably wouldn't understand it. I'm sorry.

MR. PRETTYMAN: May I speak on behalf of Capitol?

THE COURT: Yes.

MR. PRETTYMAN: As you know, after your Honor's decision and in my absence Mr. Schurtman marked an exhibit for identification which on its face would seem to have thrown into question the 65,000 figure for Canadian sales. It is my feeling, although I have submitted materials to the Court, it's not part of the record and therefore the easiest thing to do is do what I am about to do, and that is to move to reopen for the very limited purpose of putting a Canadian witness on who will testify that the 65,000 figure is accurate and explain how the other figure came about. It will take just a few minutes.

Now, how that would conceivably open up an area for Mr. Schurtman to get the Harry Fox Agency involved in terms of other albums is just beyond me. This is a very simple and direct question and once I get my evidence in he can cross-examine the gentleman and we will show you the figure is correct.

MR. SCHURTMAN: Let me answer that one point, your Honor, so we can segregate these points.

Mr. Prettyman has admitted in the letter he sent there was an error of 50,000 units. Now, he claims that the error was made not on his computations

but on the computations that were sent to the Harry Fox Agency. This is the second time that this has happened, your Honor. The last time there was an error of about 350,000 units last June.

Now, at this point, with all due respect --

THE COURT: What do you mean 350,000?

MR. SCHURTMAN: When Mr. Levy testified in his deposition, and I know we are digressing somewhat, Mr. Levy was asked how many copies of Rock and Roll do you think were sold? He said 400,000. They said, well, didn't your statements show that only about 50,000 were sold? Mr. Levy said yes, but the statements --

THE COURT: Let's not get into that.

MR. SCHURTMAN: I'm answering the question but let me get back to Mr. Prettyman's point. You will see from the figures, once his witness testifies and tries to explain the discrepancies, that the Canadian records are just in incredible shape. They give one set of figures to the Fox Agency, another set of figures to your Honor, now giving us a third set of figures.

Frankly, I don't trust any of these figures any more. What I decided to do once the problem came up with these Canadian figures is to subpoena the Harry Fox

Agency to see what figures Capitol gave to the other publishers on that same album.

THE COURT: Let's focus on that. I take it that Capitol would furnish figures to the Harry Fox Agency as to royalties due from Capitol to the owners of the copyrights on the songs in the Rock and Roll album, right?

MR. PRETTYMAN: Right.

THE COURT: That would involve figures as to how many records were sold, right?

MR. PRETTYMAN: Not on these particular songs. It relates to manufactured. That was the problem. We had to do the figures --

THE COURT: All right. You paid royalties on a manufactured basis, is that right?

MR. PRETTYMAN: For just these two songs, this one company. It's the only one they have in Canada. That's the reason they have to do it by hand.

THE COURT: For these songs on the Rock and Roll album?

MR. PRETTYMAN: These two songs owned by Big Seven.

THE COURT: Is that all you subpoenaed?

MR. SCHURTMAN: Your Honor --

THE COURT: You license a lot of songs for the Rock and Roll album.

MR. PRETTYMAN: Sure, but we have this one exception for Big Seven because they insist upon a royalty on manufactured albums as opposed to net sale albums. This is what has caused all the confusion up there. Because instead of being able to run this through the computer in Canada the way we do on the other songs we have on these various things, they have to pick two songs out and treat them manually.

What happened was when they did it, as you will hear from the gentleman, there was a foulup. But the figures we gave you, I want to emphasize, are absolutely correct.

MR. SCHURTMAN: That's what I question.

THE COURT: Just a minute. On the songs other than the two Big Seven songs you pay royalties on a sold basis?

MR. PRETTYMAN: I can't give you that absolute assurance. It is my understanding that's the normal practice. The gentleman told me in Canada he knows of no other instance, other than Big Seven, in which they sell on manufacture. I'm told in the United States it's a very rare exception. I cannot

absolutely categorically tell you.

THE COURT: But just in general.

MR. PRETTYMAN: Yes.

THE COURT: Would you report, would Capitol Records report to the Fox Agency the number of records sold?

MR. PRETTYMAN: Net sales per month.

THE COURT: For the sake of calculating the royalties on those other songs, right, in general?

MR. PRETTYMAN: Correct.

THE COURT: And is this broken down by Canada and the United States?

MR. PRETTYMAN: What happens is that Canada gets its sales figures together and sends them to Capitol. Capitol then sends them to the Harry Fox Agency with the check.

What happened here, as I say, on these two songs, because of the peculiarity of this one company, three sets of monthly figures never got from Canada to Capitol, so Capitol reported wrong figures to Harry Fox. They don't affect the net sale figures in this case. They are manufactured figures.

THE COURT: It does seem to me that Capitol, whatever documents or figures [illegible] furnished by Capitol

to Harry Fox, Capitol should have copies unless Capitol is in the habit of burning them or something like that.

MR. PRETTYMAN: You mean for the songs on Rock and Roll?

THE COURT: Yes. What I am worried about is having to enforce a subpoena against Harry Fox, and just as an initial proposition it seems to me that is an unnecessary burden. I do not understand why everything, every conceivable piece of information is not in the hands of Capitol. Unless you are going to say that Capitol is burning the stuff. In other words, every piece of information sent by Capitol to Harry Fox copies would be with Capitol, right?

MR. PRETTYMAN: I would certainly think so, yes.

THE COURT: If worse came to worse and you got all that you could from Capitol and you were still suspicious and you wanted to get the documents from Harry Fox, conceivably you could. But I think that is a terribly cumbersome way to go about it.

Capitol is in this lawsuit, Capitol will supply you with the needed figures and verifications and you can probe the matter with Capitol. Why do we have to, at least for the present moment, drag Fox into

it?

MR. SCHURTMAN: For only one reason, your Honor. Mr. Prettyman told you the reason there was a mistake in the figures was because they were manufactured records, but that wasn't a mistake.

THE COURT: Whatever it is, and I don't care what the explanation is. You may be right, he may be right. But the raw data resides, I hope, with Capitol to make whatever should be made out of it. Why do we have to get Fox into it?

MR. SCHURTMAN: Let me follow your Honor's suggestion. Let Capitol in the first instance furnish all of the Rock and Roll figures that they sent to Harry Fox.

THE COURT: Before we get into that, can we tentatively forget that phase of the subpoena?

MR. SCHURTMAN: I would like to hold it up and defer enforcement.

THE COURT: We will defer it.

What else is subpoenaed? We are just deferring until further notice the phase of the subpoena which --

MR. SCHURTMAN: That relates to Walls and Bridges and Rock and Roll.

THE COURT: Or any songs in there. Do you understand that?

MR. SHULMAN: I understand that, but with your permission I would like to submit the petition that I have prepared to resist the subpoena. I would also like the opportunity to brief the law involved.

THE COURT: I have a lot to do and I'm trying to handle it in this hearing. At least part of the problem was resolved in the last three minutes. So let's try to resolve it.

What is the other phase of the subpoena?

MR. SCHURTMAN: That takes care of the Fox subpoena.

THE COURT: That is it?

MR. SHULMAN: That's the Fox subpoena but I'm not finished because they served two more subpoenas on two clients of mine. One is the Maclen Music and one is ATV Music Corp. If I could spend a few minutes --

THE COURT: You can't spend a few minutes. I didn't have this hearing to devote it to your subpoenas. I am not going to enforce the subpoenas until further notice. You are not required to respond. I will just have to set another hearing or do something.

MR. SCHURTMAN: On Maclen, your Honor, that

would be relevant to the portion of the trial that will take place on Monday. That has to do with cover records on John Lennon recordings. That's a completely separate problem. It has nothing to do with the Canadian figures. That has to do with our claim against John Lennon that by failing to record the third song he deprived us of cover record income.

I would like to establish through the Maclen figures and the Maclen license sheets that when John Lennon records a song, even if it's his own composition, there are numerous cover records.

THE COURT: Do you know this?

MR. SCHURTMAN: Yes, I do.

THE COURT: What is your information?

MR. SCHURTMAN: Because everybody in the industry knows that Lennon songs, Beatle songs have been recorded over and over again by dozens of artists. This is such common knowledge. The only thing I lack are the specific figures, but I certainly know that the Lennon songs are so popular that everybody records them.

MR. BERGEN: That is not the issue in this case. The issue is would there be cover records of a song that was written by somebody else and recorded in 1950?

THE COURT: I can't deal with this now. You take a deposition.

MR. SCHURTMAN: All right.

THE COURT: We gathered here together over some things and you stuck in this subpoena, a last minute thing and we have to spend the entire hour worrying about this subpoena. I don't know whether it's relevant or not. It's discovery you are starting. If you want to have discovery, have discovery. Take a deposition and find out what you are talking about. I can't even decide the thing.

What else? Did you bring a witness from Canada?

I'm ready to put him on right now.

MR. SCHURTMAN: Your Honor, would you formally defer ruling on the ATV and Maclen subpoenas and we will take a deposition?

THE COURT: I will consider they are subpoenas for depositions.

MR. BERGEN: Your Honor, there is no way that we can proceed on Monday then.

THE COURT: You can start -- this is Wednesday. Get your deposition Thursday or Friday.

MR. BERGEN: Deposition of whom?

THE COURT: Of somebody who has this information that he is seeking.

MR. SHULMAN: Who is he talking about?

THE COURT: This is such a routine matter. The Court has depositions. Mr. Schurtman is talking about obtaining information about the cover records made from recordings of Lennon and McCartney.

Now, that is a very simple proposition. It may be work to find out the information but he has the right to at least explore it. I can't possibly rule about its relevancy, and so forth, unless I know more than I can possibly know tonight.

So I am directing that he can serve subpoenas or do whatever he needs to do to take a deposition or two between now and Monday, get daily copy and at least tentatively and preliminarily explore it. That's what I am saying tonight and it will be done.

MR. BERGEN: I want to make an application. I want the Court to direct that Mr. Bienstock and Mr. Wiser and Mr. Deutsch appear for depositions so I can take their depositions.

THE COURT: Application denied.

MR. BERGEN: Your Honor, I objected last Thursday to their testimony on the grounds that there was

no discovery in this case. They had not notified us they were going to put experts on. There was an objection Mr. Schurtman raised repeatedly during the trial and with respect to Mr. Marsh. They knew they were going to put these witnesses on. They never notified us. I didn't have an opportunity to question them.

THE COURT: Application denied.

MR. BERGEN: Your Honor --

THE COURT: This is a different thing.

MR. BERGEN: He is taking discovery after he has been three days into his case.

THE COURT: Put your witness on.

This is a different matter.

MR. BERGEN: It's not. These are witnesses that he pulled out of his hat.

THE COURT: If you disagree, go up to the Court of Appeals and apply for a mandamus. I won't hear one more minute on this subject.

Put your witness on.

MR. PRETTYMAN: May I move to reopen defendant Capitol Records' and EMI Records' case for the limited purpose which will appear in a moment?

I call Mr. Perlman.

THE COURT: I say to you if you have problems during the deposition you can come down to me, but the thing ought to be at least opened up. That's all I have to say.

Let's proceed.

M A L C O L M H. P E R L M A N , called as a witness by Capitol and EMI, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PRETTYMAN:

Q What is your present position?

A Vice president --

THE COURT: Spell your name again.

THE WITNESS: P-e-r-l-m-a-n. That's my surname. First name is Malcolm.

THE COURT: Your voice is so faint we are going to have a lot of trouble.

Q Try very hard to keep your voice up because the acoustics are very bad in this courtroom. It's hard for all of us to hear.

What is your present position?

A Vice president of finance of Capitol-EMI of Canada.

Q And where is your office located?

A 3109 American Drive, Mississauga.

Q What?

A Mississauga. That's the name of the suburb.

Q Of what?

A Of Toronto.

Q And how long have youbeen with Capitol Records-EMI of Canada?

A Since January 1971.

Q And how long have you held your present job?

A Well, I have had the same job since I have been there. It had a title change two weeks ago.

Q But your duties were the same?

A Yes.

Q Do your duties involve the collection of records and figures dealing with manufactured sales of records and tapes?

A Yes, that's the duty of my department.

MR. PRETTYMAN: Mark this Defendants' Exhibit EA, please.

(Defendants' Exhibit EA was marked for identification)

Q Mr. Perlman, I show you what's been marked

Defendants' EA for identification and ask you what that is.

A Yes. This is a copy of our sales figures to the end of February 1976.

Q Is that a computer printout?

A Yes.

Q And does it show the figures, the net figures for Rock and Roll as of February 29, 1976?

A Indeed it shows the gross, the returns and the net, yes.

Q Have you added up the net?

A Yes.

Q And do you recall that that came to?

A It was 65,030.

Q Now, are you satisfied that those are correct figures?

A Absolutely.

MR. PRETTYMAN: I offer that in evidence.

MR. SCHURTMAN: Did you say you got the $65,000 figure from this exhibit?

THE WITNESS: Not dollars, units.

MR. SCHURTMAN: Where is it?

THE WITNESS: I had to add them. You take --

MR. SCHURTMAN: Your addition shows 73 units.

THE WITNESS: There was a carry forward of another page on a previous song that had the same number released years ago. If you add those three figures up, those are the three configurations. The album was SK, the four track was 4XK and the eight track was --

THE COURT: I'm getting absolutely lost. You talk so faintly.

May I see the exhibit?

MR. PRETTYMAN: Yes, your Honor.

THE WITNESS: What happened is that's a continuation of another page.

MR. PRETTYMAN: I understand.

The three figures that are the relevant ones -- is it the last three on there?

THE WITNESS: No.

MR. PRETTYMAN: The first three?

THE WITNESS: Right.

THE COURT: The first three being what? What is the top line where it says SKO --

THE WITNESS: That's the album.

THE COURT: And then the 4XX or whatever it is?

THE WITNESS: That's the four track.

THE COURT: That's very small sales. Then

the eight track?

THE WITNESS: Is the 8XK.

THE COURT: Those are tapes?

THE WITNESS: Yes, eight-track tapes.

MR. PRETTYMAN: You add those up and you get the figure.

THE COURT: This is as of February 1976.

THE WITNESS: Yes.

Q Explain again the reason for the 73,000.

A The reason there is a 73,000 is that on the previous page, which unfortunately I didn't bring a copy of with me, but years ago we issued a single under the same number, that carried the same number and the history of that is included in the 73,000. That's irrelevant.

THE COURT: If I add --

THE WITNESS: If you add those three configurations up you will get 65,030.

THE COURT: I see. And the 73 total really includes something else?

THE WITNESS: Yes.

THE COURT: That is not the Rock and Roll album?

THE WITNESS: Yes.

MR. SCHURTMAN: May I see that again? I

don't have a copy to work with which makes it difficult.

THE COURT: You say this is your computer record or whatever it is ofthose sales?

THE WITNESS: Yes. It can be tied back to invoices. If you want to go to--

THE COURT: I don't want to tie them to invoices.

THE COURT: Any objection?

MR. SCHURTMAN: Is it being offered solely for the purpose of showing Rock and Roll sales?

THE COURT: Yes, that's right.

MR. SCHURTMAN: No objection.

THE COURT: I will receive it.

(Defendants' Exhibit EA was received in evidence)

Q Is it your normal practice to send royalty figures on the basis of net sales?

A No. I can state that as far as I know this is the only -- those two songs were the only ones.

THE COURT: What two songs?

THE WITNESS: The two songs --

THE COURT: Licensed from Big Seven?

THE WITNESS: Yes.

THE COURT: In the Rock and Roll album?

THE WITNESS: Yes. Those are the only two songs in our entire catalog that we have to report on manufactured sales instead -- on manufactured units instead of net sales.

Q So that if I understand you correctly the figures appearing on here would not be reported for royalty purposes?

THE WITNESS: Right. It would not be reported through our computer system because our computer system automatically picks up all sales.

Q Net sales?

A Right.

MR. PRETTYMAN: Would you mark this Defendants' Exhibit EB for identification, please.

(Defendants' Exhibit EB was marked for identification)

(Defendants' Exhibits EC, ED and EF were marked for identification)

THE COURT: Where do we go now?

MR. PRETTYMAN: Just waiting to get these back from counsel.

Q Would you identify what these four documents are, please, sir. Don't read them, just tell us what they are.

A These are the licenses pertaining to the two tunes.

Q And do they show that royalties must be paid on manufactured as opposed to net sales?

A Yes, they do.

THE COURT: This was Wa Wa, Ya Ya?

MR. PRETTYMAN: You Can't Catch Me and Ya Ya.

THE COURT: And all these four exhibits are licenses about those songs?

MR. PRETTYMAN: Just about those two songs, yes.

I offer those in evidence.

MR. SCHURTMAN: No objection.

THE COURT: What?

MR. SCHURTMAN: No objection.

THE COURT: Received.

(Defendants' Exhibits EC, ED and EF were received in evidence)

Q Mr. Perlman, is it true, therefore, that Canada on these two songs should have reported to Capitol the manufactured number of sales as opposed to net sales?

A Yes, that is true.

Q Did it in fact do so accurately?

A We thought we had but it appears as if three months' figures were not received by Los Angeles.

MR. PRETTYMAN: I ask that this exhibit be marked EG and this one EH and EI for identification.

(Defendants' Exhibits EG, EH and EI were marked for identification)

Q Showing you first EG for identification. Would you tell us what that is? You, of course, are Mr. Perlman. Who is Mr. Apsitis?

A He is, as it says there, director of operations.

Q In Canada?

A In Canada.

Q And what does this piece of paper represent?

A He was notifying the accounting department in Canada as to which units were manufactured in February on this particular album.

Q And it says CC, D. Williamson. Would that indicate Mr. Williamsonreceived a copy of this?

A Yes.

Q Who is Mr. Williamson?

A The director of the county.

THE COURT: You will have to be quiet back there. It's hard to hear.

Q Again in Canada?

A Yes.

Q Does this Exhibit show on its face that it was sent to anyone at Capitol?

A Excuse me, that gentleman is walking out with one of the exhibits. Is that all right?

Q He will bring it back. This Mr. Williamson is in Canada?

A Yes.

Q My question is, does this show on its face that it was sent to anyone at Capitol?

A No.

Q In the United States, I'm sorry.

A No.

Q Have you attempted to determine what happened here?

A I have and it appears that Mr. Williamson told me that he filed and didn't send a copy along to Los Angeles.

Q This should have been sent to Capitol, I take it, as the requisite figure for royalties, is that correct?

A Yes.

Q I show you --

THE COURT: These pertain to Ya Ya and You Can't Catch Me?

THE WITNESS: No, these pertain to the total units manufactured in particular months of the album, of the four track and the eight track.

Q I show you EI for identification and ask you to identify that.

A This is a similar document to the previous one except it pertains to manufactured units for the month of June.

Q I see Mr. Craig's name written on there. Who is he?

A He is a subordinate of Mr. Williamson.

Q Have you determined what happened on this report?

A A similar thing occurred as did with the previous one. It was filed.

Q Instead of being sent to Capitol in the United States?

A Yes.

Q Now, EH for identification, would you identify that?

A That is again similar to the previous two and it represents the figures for the month of May.

Q The names on this document, F. Wiser, D. Herbers and L. Ike, are they Capitol people in the United States?

A Yes, they are.

Q Would that indicate on its face that that at least should have gone to the United States?

A Yes.

Q And have you determined in conjunction with Capioal that in fact they did not receive it?

A They claim they didn't receive it.

Q Have you had similar experiences, incidentally, in transmitting documents and figures between the United States and Canada of figures either being lost or being delayed?

A We have had because unfortunately we have had some lengthy mail strikes in Canada and documentation has been misplaced and lost from time to time.

MR. PRETTYMAN: That is all I have.

THE COURT: Any cross?

MR. SCHURTMAN: Yes, your Honor.

CROSS-EXAMINATION

BY MR. SCHURTMAN:

Q Let's clear up --

MR. PRETTYMAN: May I ask one last question?

BY MR. PRETTYMAN:

Q Have you been informed that this matter has been corrected insofar as the Harry Fox Agency was concerned?

A Yes, I was so informed last week.

Q And an additional check was sent to them to cover these missing sales?

A Yes.

MR. PRETTYMAN: Thank you very much.

BY MR. SCHURTMAN:

Q Showing you Exhibits EG, EH and EI, are these the originals which were to be sent tothe United States?

A No. The se memos were from -- it was a departmental memo from the director of operations to me telling me what the manufactured units were. Then it was the responsibility of my department to transmit this information to Los Angeles. The normal procedure was that sales were picked up through the computer, which is be case for every single copyright we have except for those two songs.

Q But how would you transmit this information to the United States?

A Through the mail. It's a manual operation.

That's why the mistake occurred.

Q Do you have a copy of what you say you may have transmitted through the mail?

A I don't understand the question.

Q Well, this is an internal memorandum in Canada.

A Yes, but what usually happened, as is indicated there, we try to save time and money, instead of retyping things we just put copy on it and put it in the mail and let it go down to the accounting department.

Q Now, you have testified to the Court that except in the case of the two Big Seven songs on the Rock and Roll album you always report net sales to the Harry Fox Agency; is that correct?

A Right.

Q And in the case of these two songs you should have reported actual manufactured records?

A Right.

Q And the manufactured records would have been approximately 89,000?

A Correct.

Q Now, how much were your sales for the period, net sales?

A To the period ending December?

Q Yes.

A They were slightly higher than the period ending February.

Q They were approximately 65,000?

A Yes.

Q Now --

THE COURT: So 89,000 is as of December?

THE WITNESS: Yes.

MR. SCHURTMAN: Manufactured.

Q And 65,000, approximately, would be the net sales?

A Right.

Q Now, I show you Plaintiffs' Exhibit 402 for identification. This is a letter from the Harry Fox Agency setting forth statements obtained from Capitol Records-EMI of Canada. Would you look at the statements annexed to the Harry Fox letter. Are those statements prepared by you?

A They are prepared from our source documents on the Los Angeles computer, on the Capitol US computer.

MR. SCHURTMAN: I offer 402 in evidence.

THE COURT: Any objection?

MR. PRETTYMAN: May I take a look at it, your Honor?

THE COURT: Yes.

(Pause)

MR. PRETTYMAN: I have no objection.

THE COURT: Received.

(Plaintiffs' Exhibit 402 was received in evidence)

Q Now, these are the statements that you have testified incorrectly recorded net sales instead of manufactured units, is that correct?

A Well, unless I check the figures I'm not prepared to say that's the case. You know, in theory that's what it should be but I'm not prepared to say that's correct without checking the figures.

Q In theory then let me direct your attention to the statement for the period 1/75 to 3/31/75.

A Which is the first period?

Q The first period on the Rock and Roll album. What I have done for convenience sake, sir, I have encircled in red the song You Can't Catch Me which appeared on the Rock and Roll album.

Now, you are telling me that in theory reported net sales to the Harry Fox Agency?

A No, sir. We reported manufactured units on those two songs. This is the way it was related to

me.

Q You reported manufactured units on these statements?

A Yes. This is the whole purpose of my testimony, to indicate the three-month sales that were inadvertently missed.

Q Very well.

Now let me call your attention to the following. If you will look at the four quarters of 1975, the first quarter shows -- you say it's manufactured units. It shows total manufactured units of 15,013. The next statement, which is the quarter starting April 1st to June 30th, that shows units of 7,229 total, is that right?

A Yes.

Q The period 7/1/75 to 9/30/75 shows a total of 1907?

A Yes.

Q The period 10/1/75 to 12/31/75 shows a total of 5424?

A Right.

Q Now, that adds up, and I have done the addition for you but you are welcome to check it, it adds up to 29,573 units.

A Right.

Q Are you saying that the error in question involved the difference between 29,000 and 39,000, 60,000 units?

A Yes. If you will look at the exhibits --

THE COURT: This is a matter of arithmetic. Again we don't have to sit around here while people pore over exhibits. You can get this and you can look at the things and straighten it out informally.

MR. SCHURTMAN: First time I have seen these exhibits.

THE WITNESS: I would like to explain to the gentleman --

THE COURT: I don't really need that. It either adds up or it doesn't.

THE WITNESS: But just to --

THE COURT: You can add this up. If you have a problem --

THE WITNESS: It's the very first month that was missed, which is the biggest month. That's always the biggest production month.

Q Do any of the other items on these statements refer to manufactured units or to actual sales?

A To the best of my knowledge the only two

tunes that refer to manufactured units with those two tunes, on any statement that we have issued to anybody.

Q Now, the song Ya Ya appeared in two separate albums, did it not?

A I can't answer that. I don't know.

Q Well, are you familiar with an album called Walls and Bridges?

A I know the album.

Q Did you have anything to do with the preparationof royalty statements for Walls and Bridges?

A Not directly but certainly we would have issued the checks. But the royalties were prepared in Los Angeles.

Q In the case of Walls and Bridges do you know whether the license required royalties on manufactured units or on net sales?

A We never reported manufactured units because I was never instructed that way. So I can tell you that to the best of my knowledge, unless a subordinate of mine did something which I didn't or wasn't informed directly of, it would have been on net sales.

Q On net sales?

A Yes.

Q Can you tell me when you report royalties to

the Harry Fox Agency in net sales do you retain a reserve?

A Yes.

Q How much is the reserve each quarter?

A I'm not aware of that. That is something which is computed -- they have a computer program in Los Angeles and the amounts of the reserves withheld I don't know. I only account for the monies that they say we should account for.

Q Well, let me call your attention to the same statemens which are part of Plaintiffs' Exhibit 402 in evidence. Do they reflect royalties for Ya Ya in a different album from Rock and Roll? You can tell it from the album numbers.

A Yes.

Q I suggest to you that the total royalties reflected for Ya Ya as recorded in Walls and Bridges showed net sales, if that is what they show, of 53,248. I mean you would have to add it up but take my arithmetic because I have done it.

A All right.

Q Now, the claim has been made in this case that the units of Ya Ya that were actually sold during that period in Canada were 48,800.

MR. PRETTYMAN: You mean of Walls and Bridges?

MR. SCHURTMAN: Of Walls and Bridges.

Q Taking these two figures can you tell me what the reserves would have been in the case of net sales?

A I can't tell you.

MR. PRETTYMAN: Is this in the other case, in our case or what?

MR. SCHURTMAN: In your case.

MR. PRETTYMAN: Just tell me where you got the figures.

MR. SCHURTMAN: On Ya Ya?

MR. PRETTYMAN: Yes.

MR. SCHURTMAN: Sure. I got it from your exhibit DF, which shows Canadian sales of Walls and Bridges, 48.8. That's what you based your US projections on.

MR. PRETTYMAN: Through what date?

MR. SCHURTMAN: It's your exhibit.

MR. PRETTYMAN: September, 1974. I'm sorry, that's the release date. Where is the date? Are you arguing a particular date for this?

MR. SCHURTMAN: I'm not arguing anything I'm questioning the witness.

I'm asking you if you are familiar with the

reserves that are set up for net sales.

A No.

Q Who at Capitol Canada would be familiar with the reserves that are set up?

A Nobody in Capitol Canada.

THE COURT: He said they were carried out in Los Angeles. The reserves were set up in Los Angeles.

Q So are the reserves programmed into the computer as far as you know?

A Yes.

THE COURT: Anything more for this witness?

MR. SCHURTMAN: I want to find out how much this witness knows.

If he doesn't know the reserves I can't really pursue anything with this witness because there are discrepancies in the Walls and Bridges album as reported to Harry Fox --

THE COURT: Are you talking about Walls and Bridges?

MR. PRETTYMAN: It's a subject I'm not reopening and it can be accounted for by simply the change in dates.

MR. SCHURTMAN: It cannot be accounted for by the change in dates.

THE COURT: We are not going to go on with this case forever. I wrote a decision or a dictated decision from the bench. Then at a later point you got something from Harry Fox or some record having to do with royalty reports to Harry Fox and you said that the $65,000 figure for Rock and Roll sales that Capitol had used in its computations for Canadian sales was wrong, and you brought that up and Mr. Prettyman was given notice of that problem through Mr. Bergen and I got a letter and now I have a witness.

Now, I think we have to end this. I'm not prepared to deal, nor is anybody else prepared to deal, with some other alleged discrepancy.

MR. SCHURTMAN: It's not another alleged discrepancy. It's in the exact statement we have challenged.

THE COURT: It's nothing you have ever mentioned before and I have to bring this to a close.

MR. SCHURTMAN: Let me explain to you what my position is very briefly and I'll tell you what I am trying to prove. They claimed sales in Canada of 65,000 units in Rock and Roll. We received the Harry Fox statements which showed sales of 29,000 for Rock and Roll. Bear with me for a minute.

We challenged that and we said how come you told the Court 65,000 when in fact it's 29,000? They now come back and say that was a special situation. It was really 29,000 manufactured units except we made the mistake because it wasn't 29,000, it was some 80,000. So they said the 29,000 was wrong both ways.

I now look at that same statement and I find that it also reports royalties for Ya Ya which was recorded on Walls and Bridges. It appears on the same statement.

According to this witness' testimony that should be net sales. Yet I find there is a discrepancy between the net sales of Ya Ya on the same statement and the net sales that were reported to you.

Now, at this point it seems to me that the figures that were reported to you simply do not mesh with the Harry Fox figures.

THE COURT: I say to you that the problem about the 65,000 figure has been cleared up.

MR. SCHURTMAN: It hasn't been cleared up. It has been cleared up only if you accept the testimony that the Harry Fox statement --

THE COURT: That's the only way you clear

anything up in a court. You either have documents or you have testimony. We have a witness who has stated under oath exactly what he has stated. Now, unless I disbelieve this witness, that clears that up.

If there is another problem and we are going to inquire about that, maybe that will be cleared up, so to speak, maybe it won't.

MR. SCHURTMAN: Your Honor, I submit to you he hasn't cleared it up. What he has told you is--

MR. PRETTYMAN: This is a manufactured problem. The dates could easily be different on it.

THE WITNESS: I would like to, if I may, just intercede.

THE COURT: Don't if you may.

MR. SCHURTMAN: What the witness has told you is that the 29,000 figure is incorrect.

THE COURT: I know what he has told me.

MR. SCHURTMAN: What he hasn't explained to you is why there is a discrepancy on the same statement --

THE COURT: That's another problem.

MR. SCHURTMAN: It shows the same statement is inaccurate in another respect.

THE COURT: It may or may not. I don't have any idea. You know as well as I do that there are

lots of opportunities for differences in figures depending upon the basis for the figures, date, manufactured, sold, net, gross, on and on.

Now, in some rough way we have been hoping that we have been dealing with comparable figures when we have been -- in other words, we have been hoping in some rough way that the figures we were dealing with for comparative purposes have been comparable figures. But I have no doubt that perhaps a finer analysis of all those who have come up with something slightly different. But nobody before this went into this in this detail. And I'm not going to start that exercise now.

MR. SCHURTMAN: Look, your Honor. On Exhibit DF, which is the exhibit on which you based your finding of damages, it's the Canadian sales which you accepted as an indication of what should have happened in the United States. In order to even accept this projection you had to accept all of the figures on that projection including Walls and Bridges.

THE COURT: I get your point. I'm concerned about time.

MR. SCHURTMAN: You have awarded damages of $430,000 and you tell me I can't spend time?

THE COURT: You can't reopen the case.

MR. SCHURTMAN: I am challenging figures which I submit are false and fraudulent.

THE COURT: I have to bring an end to this.

MR. SCHURTMAN: I am asking your Honor at this point if this witness is unable to explain the discrepancy in Walls and Bridges, then let Mr. Prettyman explain the discrepancy.

THE COURT: I will not have another witness. You can go out to California and you can look at their books.

MR. SCHURTMAN: That is what I would like to have.

THE COURT: You look at their books on that one item, that one item only and that is it. You can make some kind of a report to me.

MR. SCHURTMAN: Thank you.

THE COURT: That's it.

What else do we have to deal with? As far as the 65,000 I am not reopening my decision at this point on the basis of the alleged discrepancy between the 65,000 figure and the so-called figure given to Harry Fox, and I will announce that ruling now.

MR. PRETTYMAN: Your Honor, in terms of the so-called problem -- is the witness concluded?

THE COURT: Yes.

(Witness excused)

MR. PRETTYMAN: The so-called problem on the foreign sales --

THE COURT: You had better get to Los Angeles and back by Monday. This case ends on Monday. I don't care what you have to do.

MR. SCHURTMAN: Will you direct Mr. Prettyman to make the records available to us in Los Angeles?

THE COURT: Yes. It's a very simple matter.

MR. SCHURTMAN: I hope you are right.

MR. PRETTYMAN: Your Honor, in regard to the so-called foreign sales figures, you remember they were the three figures --

THE COURT: 13,000.

MR. PRETTYMAN: American, Canadian and the foreign. I personally think the record is clear. In Mr. Posner's testimony at 3029 and 3043, but I brought Mr. Coveney from the New York office of Capitol who can tell you in three sentences what that is.

Would you take the stand, sir.

J O H N C O V E N E Y , called as a witness by Capitol and EMI, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PRETTYMAN:

Q What is your position at Capitol?

A Director of artists relations for the classical division.

Q Now, would you tell us, sir, explain to us what the so-called foreign figures refer to.

A I received these this afternoon about an hour ago, hour and a half ago on the telephone from Los Angeles from Mr. Posner himself. Through February '76 the total foreign sales --

MR. SCHURTMAN: I object if the witness has no personal knowledge.

Q I am just asking what foreign sales are. I'm not asking you for figures or anything else. What are they?

A In this context they are sales to exporters in this country who take the records and sell them overseas or to headquarters of PXs for sales in PXs overseas.

Q Is the greater percentage in PXs or in sales to exporters?

A To PXs.

Q And are the exporters located in this country?

A Yes.

Q I take it then they in turn resell someplace outside the United States?

A Yes.

Q That is what is encompassed within the so-called foreign sales category?

A Yes. We call them international sales.

MR. PRETTYMAN: Thank you very much.

MR. SCHURTMAN: I have some questions.

CROSS-EXAMINATION

BY MR. SCHURTMAN:

Q Are you familiar with the prices charged for export albums?

A In this case, yes.

Q In this case?

A In the case of this particular album.

Q Are you basing it on what Mr. Posner told you?

A Yes.

Q Do you have any independent knowledge of prices charged for export albums?

A An enormous independent knowledge. I have

been with the company 31 years in every conceivable capacity.

Q Not in this case what Mr. Posner told you, but tell me of your own independent --

A I don't carry these in my mind.

Q Are the same prices charged for domestic albums as for foreign?

A No. In this case yes. You must tell me what you mean.

Q My question is what is your general practice? Do you charge the same prices?

A The general practice is lower.

THE COURT: Let him finish his question.

A The general practice is lower.

Q You charge lower prices abroad?

A Well, may I make a statement, because maybe it will help your questioning?

Q Yes.

A The discount structure for this album was based on the domestic suggested list price, which is 5.98 for the disk and 6.98 for the tapes.

A I am asking yo ufor the general practice of Capitol. In other words, there has been testimony in this case, sir, that the prices for export albums of

foreign sales and domestic must be in the same ratio.

THE COURT: You don't have to quote him. Ask a question.

MR. SCHURTMAN: I'm trying to.

Q Now, tell me again, what is the normal price differential between export albums and domestic?

A I don't know precisely in percentage terms or in dollars and cents. I'm merely saying it's lower.

Q Give me an approximate figure.

A I can't. I'm not in sales. I have been for 17 years.

Q So you don't know.

A Now just a minute, please. I know if I have the documents.

THE COURT: Mr. Coveney, it's very late. You were asked about a very limited area on direct.

A Don't tell me what I know or don't know.

THE COURT: Take it easy now.

Q Are there any special costs related to export albums that you don't have in connection with domestic albums?

A No.

Q Any special packaging costs?

A Yes.

Q Any freight costs?

A Yes. I don't know how much is paid by us and by the exporter. It must all be paid by the exporter because the deliveries are made in this country.

Q To whom?

A To the exporters.

Q Who are the exporters?

A The headquarters are in Dallas and Atlanta in the case of PXs.

Q Do the exporters buy domestic albums from you and package them for export?

A They buy them as is, already sealed and wrapped.

Q My question is, are thereany special expenses in preparing the albums for export?

A No. To the best of my knowledge.

Q Do you know why there is a price differential between your export albums and domestic?

A No, I don't. I did when I was a salesman. That's a long time ago.

MR. PRETTYMAN: I would like to point out in the two places -- were you finished?

MR. SCHURTMAN: Are you arguing at this point?

MR. PRETTYMAN: I wanted to point out Mr. Posner did refer twice to the PX situation. This is not entirely a new situation. I wanted to clarify that.

THE COURT: Can't we dismiss this witness?

MR. SCHURTMAN: I don't think he knows the facts we need for this purpose.

THE COURT: Fine.

THE WITNESS: I can obtain them.

MR. SCHURTMAN: I wish you would.

THE WITNESS: May I say something? The other gentleman was told to bring his charts. I could have brought all you want.

THE COURT: Thank you very much for coming down.

MR. SCHURTMAN: If I may address myself to that last point, I submit that there is still no evidence in the record to show --

THE COURT: I'll check on that.

MR. SCHURTMAN: -- that the 30,000 export units are entitled to the same treatment as the domestic sales.

(Witness excused)

THE COURT: I will have to confess that I have not reviewed that. I will review it. I have a letter from Mr. Prettyman.

MR. PRETTYMAN: Not on international. I didn't know anything about this international problem until Mr. Schurtman -- Mr. Schurtman didn't inform me about this but only about the other.

THE COURT: You give us the references. I think Mr. --

MR. PRETTYMAN: I would also like to point out that Mr. Schurtman stated all of his objections in the light of this testimony at 2948-9.

THE COURT: What are your references?

MR. PRETTYMAN: 3029 and 3043.

THE COURT: Now let's leave that question. I'll review that.

Are you preparing or have you prepared the breakdown of the royalties on those exhibits?

MR. SCHURTMAN: Yes.

THE COURT: Can we have that by Monday?

MR. SCHURTMAN: Yes. I question the relevance of the breakdown, your Honor.

THE COURT: I think we are past that.

MR. PRETTYMAN: Am I through, your Honor?

THE COURT: Yes.

MR. SCHURTMAN: We haven't touched upon the relevancy --

THE COURT: Don't run off. I don't understand this questioning the relevancy. We discussed that at great length last week. You promised to provide the figures.

MR. SCHURTMAN: I'm giving it to you. All I'm saying is I don't think they are relevant.

THE COURT: Another thing which we raised in a kind of general way was this question as to the proper basis for computing damages.

MR. PRETTYMAN: Is this me?

THE COURT: Yes. When I dictated that bench decision I was relying on the statement by Apple that they were seeking no independent compensatory damage award. I was relying on the presentation of Capitol that their damage claim was a net figure after deduction of all variable costs including payment of royalties or fees or anything like that; right, Mr. Prettyman?

MR. PRETTYMAN: Yes, sir.

THE COURT: Now it seemed to me agreed all around last week that the proper way to compute damages in general would be on a net basis, and the only

problem that came up that seemed to be unresolved was whether I had really used a net basis for computing Mr. Lennon's damages and how I would apply a net basis type of calculation in any damage aware I granted to the plaintiffs on the claim we are now trying.

So, strictly speaking that doesn't concern you. In case there is any spillover problem, I wish you would stay here for just a few minutes, Mr. Prettyman.

You were going to all consider that. Now, what do you have to say on that?

MR. SCHURTMAN: Someone has to pay the AF&M fees. We are talking about approximately $19,000.

MR. BERGEN: They have already been paid and the documents were produced by Capitol and evidenced they were paid.

MR. SCHURTMAN: They wouldn't have been paid on units that weren't sold. We are talking about the hundred thousand additional units that you found should have been sold that weren't sold. Is Mr. Bergen telling me he paid AF of M on units that weren't sold?

MR. BERGEN: Yes. Right in here in the documents produced by Capitol.

THE COURT: I awarded Mr. Lennon royalties on $100,000 presumed additional sales that were lost,

right?

MR. BERGEN: That's correct, your Honor.

THE COURT: 68 cents, wasn't it?

MR. BERGEN: 66 cents.

THE COURT: So that was $66,000, right?

MR. BERGEN: That's correct.

THE COURT: Then I also awarded Mr. Lennon a 10 cent per album additional royalty because of the lowering of the price, that problem.

MR. BERGEN: That is correct.

THE COURT: Just let me see what your contention is. The problem about fee would not affect the 10 cent.

MR. SCHURTMAN: Might affect it slightly but that's not my major point.

THE COURT: You are saying there should be a deduction out of the 66 cents, right?

MR. SCHURTMAN: Yes.

THE COURT: What deduction do you say should have been made?

MR. BERGEN: What is it based on? Has he a witness here to testify about it?

THE COURT: Let's hear what his contentions are.

MR. SCHURTMAN: On each album that is sold in an AF of M fee would have to be paid. I'm told it's .056. That's an average of tape and record.

THE COURT: What per unit?

MR. SCHURTMAN: Paid to the American Federation of Musicians.

THE COURT: What is the per unit fee?

MR. KANZER: Approximately 5 and a half cents.

MR. SCHURTMAN: 5 and a half cents.

THE COURT: What is the evidence to support that?

MR. SCHURTMAN: It's industry practice and the American Federal of Musicians agreement.

THE COURT: Is that in evidence?

MR. SCHURTMAN: Not at this point. The reason is because the defendants had the burden of proving their deductions. What they did, they left out the AF of M figure. When I cross-examined Mr. Posner he said that Capitol doesn't pay that, Apple pays it. The only trouble is that Apple, under the Beatle settlement, is not entitled to any royalties. If you recall the Beatle settlement, Mr. Lennon gets royalties. You are awarding the royalties to Mr. Lennon. Then in order to get a net figure he ought to deduct the

AF of M payments that would have been made if these hundred thousand albums had been produced. That is our only point.

I'll be glad to put a witness on except I don't think it's my burden to show what the AF of M payments are, but if you think it is I will put a witness on for that purpose on Monday.

THE COURT: The only thing is everybody rested, you see, and it was perfectly evident when Mr. Bergen questioned -- was it Mr. Posner?

MR. BERGEN: Yes, your Honor.

THE COURT: He stood up and he asked questions about royalty rates. The obvious intent was to lay a foundation for calculating damages to Mr. Lennon and the record was closed without anything about another -- a deduction.

MR. SCHURTMAN: I had raised that point specifically and I cross-examined Mr. Posner and I said "Now who pays the AF of M?"

He said Apple pays is. I started to go into the Beatles' settlement to show that Lennon pays it and your Honor said that he testified Apple pays it and move on to something else. I'm not misquoting the record. That's what it shows exactly.

What I suggest to your Honor at the moment is no evidence in the record from the parties who had the burden of proof on it that AF of M fees have been paid. They had the burden.

MR. BERGEN: Nothing in the record to show that any AF of M fees have to be paid.

THE COURT: I think we all gathered for an oral argument. I think it would have been good to bring it up then. I will say on Monday, among our other problems, if you want to put on evidenc e about the deduction, you can put it on.

MR. SCHURTMAN: I will do that.

MR. BERGEN: I would like to know right now what evidence he is going to put on so we can be prepared on Monday.

THE COURT: I am going to go back to the subject we were on at the first of the hearing, but in order to make this thing move as quickly as we can Monday, and can we start at 9 o'clock? We really have to move because I have a criminal trial starting that day and I don't want to have any more sessions of this.

You just have to get together and have some reasonable cooperation between now and Monday. I think if you do you can avoid trips to Los Angeles and

you can avoid depositions of the Harry Fox people and all of that nonsense. Really, what you are dealing with are matters of dollars and cents that must be known to everybody in sight. If there is a deduction that Mr. Lennon or an expense or a fee that he would pay out of the 66,000, I am sure that that can be known and stipulated to and if it's right to deduct that from Mr. Lennon's damages it can be so deducted.

I am not going to hold the record closed. We have not gone so far that we award Mr. Lennon damages to which he is not entitled. So the record can be reopened, but I expect the attorneys to cooperate in getting the facts stipulated.

Now, on this thing we were talking about at the very start of the hearing, that may open up a real can of worms, it may not. I don't know. The fellow from Harry Fox was heated and Mr. Bergen was heated and everybody was very upset to have that opened up. It's impossible for me sitting here in my present state of knowledge to know whether that's a useful line of proof or not.

You,on behalf of Mr. Levy, Mr. Schurtman, are trying to prove something which is difficult just as Capitol and Lennon were trying to prove some

difficult things when they were trying to support their counterclaims, and they brought in and Capitol brought in things like Canadian sales as circumstantial evidence of their proposition.

I have no intention of cutting you off from any valid line of proof as long as youcan get it into this court in a decent form and get it in on Monday. But you had witnesses who were, I thought, very logical, understandable and persuasive. I will tell you now that the recording by Lennon of a song would as a general proposition enhance the value of the copyright in that song. You had witness after witness. Their testimony was basically uncontradicted to this point. Maybe somebody will come in and contradict them, but that is a very good starter for you.

Anybody sitting here would have been impressed with those men. Now, obviously the exact -- and what happens in such a situation depends on a lot of imponderables. The particular song could catch on and develop 75 cover records or it could develop none in a particular instance. We don't know.

Just as in the case of Capitol's counterclaim we don't know what this record would have sold had it not been for Levy's competing Roots album and all of

this. We don't know.

Nor do we know what cover records there would have been if things had gone the way you say they should have done. I don't have to know. I just have to have evidence that permits me to draw an estimate.

Now, you have what you consider analogous situations. But I tell you, Mr. Schurtman, when anybody has to prove an estimation of this kind I don't want to cut them off prematurely. But you are sort of following up a criticism of your proof that you believe Mr. Bergen made.

Now, I say to you my present intention, unless there is some very persuasive rebuttal, I think that the testimony is pretty convincing that as a general proposition the value of the copyright is enhanced. I believe it is my job to make an estimate, some reasonable estimate of what that would have been, just as I tried to do in the case of Capitol's claim and Lennon's claim before.

I think it would be very hard to convince me that there was just no enhancement. I just say if we can keep this case in some reasonable bounds and not just keep coming in with more and more and more and more, I don't know what I am going to gain eventually.

I have the cases that you feel were good analogies. Now they did deal with situations where a prominent artist recorded a song of another artist.

Now, if you can add to your case and you can produce helpful evidence to me by showing some instances of cover records where Lennon records his own songs and cover records are taken of that, fine. But there has to be a way, and I'm counting on you and I hope that guy from Fox will have some sense of how to help you get to the facts and see whether there is anything to this and get a simple, clearcut, a few illustrations and let it go at that.

I talked about a deposition. I don't see why you have to take a deposition. Can't you go and tell them that I have asked them to give you some material and talk it over with you to see if you can get a few illustrations of what you are talking about and get it in a form which can be presented, or drop it. I don't know what you will decide. Goodness knows, there must be a way to do that.

As far as this so-called discrepancy about Walls and Bridges, talk it over with Mr. Prettyman. See whether it's a date problem or what it is and get the information. Try to get these things wound up.

MR. PRETTYMAN: May I make one brief statement in regard to the international sales? I think that perhaps you might not understand my position. Mr. Posner was on the stand and gave those sales figures. They were on a sheet of paper. He had supporting documents prepared to go into it if necessary. There was no question about it --

THE COURT: Mr. Prettyman, my problem is literally since that question was suggested I haven't gone back over anything. I haven't gone back over it.

MR. PRETTYMAN: I'm saying that the figure itself is in the record.

THE COURT: If it is, it is.

MR. PRETTYMAN: Mr. Schurtman had a chance to go behind it. The supporting papers were right there.

THE COURT: If it is in the record it is there.

MR. PRETTYMAN: In an exhibit.

THE COURT: I don't think there is anything more we can do tonight.

MR. BERGEN: I think thereis, your Honor. Your statement that you just made only highlights the reason why we should be permitted to question the witnesses that were put on by Mr. Schurtman, the three

experts. You have just about stated it. I had them in court with no prior opportunity to talk or question them, no prior opportunity to discuss what they would testify to with an expert of my own.

I had literally no time to prepare any cross-examination. They were here.

THE COURT: The thing I was trying to get at is this: When I was talking to you before my memory of when they were on the stand, they were on the stand in a fairly leisurely manner. They were subject to what I thought was a fairly informed cross-examination.

Now, if you feel that there are other things you want to explore with them, take what steps you feel should be taken. I imagine they would be willing to interview you. If you want to recall them, recall them. In other words, if there is something you need from them of substance, of course you may.

MR. BERGEN: I won't call them back just for the sake of asking them nothing.

THE COURT: If there is something on further reflection you feel that you need to do with those witnesses or any other witness on the current problems, of course you can do it.

If on further reflection and discussion with

your experts or your client or whatever you feel there are points you now would like to ask them about, do so.

MR. BERGEN: Fine, your Honor.

THE COURT: That is a legitimate request.

MR. BERGEN: Thank you, your Honor.

THE COURT: We will see you at 9 o'clock Monday, except you need not be here, Mr. Prettyman.

One other thing is this question of the second stage of the come together settlement. Has anybody briefed that or are you going to brief it or not?

MR. SCHURTMAN: No, your Honor. We take the position you have stated on the record you will not permit me to offer proof of damages. Under the circumstances I ask your Honor to enforce the settlement agreement according to its terms. Mr. Lennon has not shown any prejudice by reason of the fact that because of the circumstances that prevailed early last year, that particular part was not carried out.

THE COURT: You are going to have to brief that. You are going to have to brief the situation that exists, and that is, that I have told you, and I will adhere to this, that I believe the reason that that second phrase was not carried out at thattime

was the letter of Mr. Levy sent in early January where he, in effect, says we are not proceeding along this line.

I will adhere to what I have already said, that under those circumstances I can't hold somebody liable for damages for not doing what Levy said not to do.

Now, if you have a basis for having me under those circumstances order Lennon to perofm that, you have to come up with it. I can't think of it. It's not the same situation as the alleged breach, because that took place well before that.

MR. SCHURTMAN: You did make a specific finding that the settlement agreement was not abrogated.

THE COURT: What I am saying to you is, you are talking about specific performance of a contract under a specific circumstance. I would think there would be some law that you could tell me about. I think you had better get it to me in the next day or so because that is a tricky subject.

MR. SCHURTMAN: It is.

THE COURT: Let's leave it at that.

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BIG SEVEN MUSIC CORPORATION, et al.,

V. 75 CIV. 1116

JOHN LENNON, et al.,

April 26, 1976
9:00 a.m.

T1A

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MR. SCHURTMAN: If your Honor please, we have been spending the last few days trying to figure out these Canadian figures. I have subpoenaed Mr. Alan Klein, who you have previously heard as a witness, who has certain Canadian statements which --

THE COURT: What is he doing with Canadian statements?

MR. SCHURTMAN: He receives royalty figures and and sales information in his capacity and we would like him to produce these Canadian statements.

THE COURT: I haven't even decided to reopen this. I want to go over the record. I got a couple of long letters from you and I have other things to do besides this case, so I don't immediately sit down and read your six-page letter because I have other problems than this case. It's not the only case before me.

MR. SCHURTMAN: I understand.

THE COURT: Now, I want to go back over the record, and I assume there was a point you rested on the counterclaims, right?

MR. SCHURTMAN: Yes, there was.

THE COURT: Where was that point? Have you gone over the record? I mean, I would like to know whether Mr. Schurtman has a right to prolong this. If you have got a right too, fine, but if you don't, I am not going to hear Mr. Klein or have subpoenas to Mr. Klein or any other proceedings and I want to review the record.

MR. PRETTYMAN: May I make a statement, your Honor?

THE COURT: Let's have it pinned down to something. There must be some place in this long record that will throw a little light on the situation.

MR. SCHURTMAN: Your Honor, I objected originally to the admissibility of all the Canadian figures.

THE COURT: Your objection is overruled and you should have been prepared to meet it.

MR. SCHURTMAN: Subsequently --

THE COURT: Would you just mind, I am asking you both to desist until I find something in the record. You have the record. Can you give me any assistance?

MR. SCHURTMAN: Yes. That's what I was trying

to do.

THE COURT: I want to know specifically where you rested and then we will work back from there.

MR. PRETTYMAN: April 7th is my understanding, your Honor.

MR. SCHURTMAN: Your Honor, it's on page 3347. The transcript of April 7th.

THE COURT. All right. Mr. Schurtman said at page 3347 on April 7, 1976 "At this point, your Honor, plaintiffs and defendant Levy rest on defendant's counterclaim."

Now, that was at the end of how many days of trial on the counterclaims? When did we start all that?

MR. BERGEN: We started on March 17th, your Honor.

MR. SCHURTMAN: Except that we also tried portions of the other case in between.

THE COURT: What do you mean the other case?

MR. SCHURTMAN: Our claims against Lennon. They were all intertwined.

MR. BERGEN: There was very little of that, your Honor. We had trial on the counterclaims on March 17th and 18th, on March 30th, 31st and April 1st and then we resumed on the morning of April 7th.

THE COURT: We had that pretrial conference as I recall.

MR. BERGEN: That was on the 27th.

THE COURT: Of what?

MR. BERGEN: February.

THE COURT: Then we started March 17th with the counterclaims.

MR. BERGEN: And the 18th and then we adjourned for a week and resumed on the 30th, the 31st of March, April 1st and then we adjourned to April 7th and then we finished on the 7th and had the final argument on April 8th.

MR. PRETTYMAN: May I say something, your Honor.

THE COURT: Just give me another minute.

So at the end of the sixth day of trial, lasting over a period of some three weeks, your rested. Now, what is there that entitles you to keep writing me letters telling me that you wnat to offer additional proof or making statements in the course of subsequent proceedings on different claims indicating you want to offer additional proof?

MR. SCHURTMAN: There are several aspects, your Honor.

THE COURT: If it is a matter of law that I

made a mistake on, that's different, but proof should end. That's the whole point of saying you rest. It's a very important moment.

MR. SCHURTMAN: Your Honor, I called your attention some days ago to the fact that there was a very large discrepancy between the Canadian royalty statements.

THE COURT: That has been settled. There has been nothing to that argument.

MR. SCHURTMAN: There is a great deal to it.

THE COURT: I ruled that there wasn't.

MR. SCHURTMAN: Capitol admits there was a difference of over 200 per cent.

THE COURT: I don't want to discuss it any further. We discussed it the last time and I told you to get me additional Canadian figures.

MR. SCHURTMAN: You certainly did, your Honor. At that point I got together with Mr. Prettyman. You indicated we should send someone out to California before today to check the figures --

THE COURT: Look, Mr. Schurtman, I will not accept this misguided attempt to throw this on to me. I did not reopen it. I slipped unwittingly and probably carelessly into a kind of reopening -- in other words, when somebody says that a figure is wrong that I relied

on, well, my instinct, without too much caution, is sure, see what it is and at that point -- I don't think I even went that far. I said to you on therecord when you brought up this alleged discrepancy or error in the 65,000 Canadian sales, I said notify Mr. Prettyman and I asked Mr. Bergen to be the liaison because Mr. Prettyman had long since departed from the case.

The next thing I knew Mr. Prettyman, and I don't know whether he did it over protest or without protest, but he was here with a witness some day last week --

MR. BERGEN: It was the 21st, your Honor.

(Continued on next page.)

THE COURT: The 21st, late in the afternoon with a witness who explained this what I can only say was a completely false lead about a problem about the 65,000.

Then you, upon examination of other figures, decided that there was a problem about some other figure and in order to -- again probably without the most mature consideration of what we might get into, I said try to resolve that in the simplest way you can. Whatever is the simplest way commensurate with reasonable attention to the accuracy without dragging this on together, I am all for, as we all are.

Then I get this letter, which I must say for the first time alerted me to the almost indefinite magnitude of what you are doing, and at this point I am concerned and I probably should have been concerned earlier about enforcing a few rules and saying that if you rest you rest.

MR. PRETTYMAN: Your Honor, may I just back that up?

THE COURT: I was not suggesting and goading and provoking you to keep prolonging this case by any means.

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MR. PRETTYMAN: May I just back up what you say and let me say where we are?

THE COURT: Yes.

MR. PRETTYMAN: I was informed the other day by Mr. Kaner on the phone that they thought virtually all the figures that we had given were wrong and I tried to go back and try to figure out how in the world could they reach any such conclusion.

In view of all the subpoenas that they put out around town obviously what they were doing was getting royalty statements to publishers and statements to Mr. Klein and so forth.

All right, there are differences between those statements and the statements that we gave that are accounted for in a perfectly logical fashion, and I have two witnesses here that I borught all the way from California just in the event that you might reopen this thing again and we put in this ton of papers.

We were going to explain to you that they are accounted for by the PX and domestic export sales, by free goods, by a reserve. The differences are all perfectly explainable. Our figures are perfectly accurate and correct.

The mountain of material which they are going

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to offer you, if you open this thing up, they are going to prove them, I am going to put my witnesses to explain the difference and we are going to be right back to where we were before with our figures being proved right absolutely accurate.

Now, if you want to go through that for however long it takes, I brought my people here in order to do it, but I just think there comes a point, your Honor, where the thing has to stop and I would suggest that that is where we are.

THE COURT: The thing is, this is all out of prospective. The Canadian figure was relevant and used in two ways. It was used as an actual numerical basis for the calculation of part of the damage figure for the price reduction claim.

Now, that 65,000 figure as far as Canadian sales was presented initially in the proof, I am sure we could find the exact date that fiture was put in by way of exhibit form or testimony.

We did reopen the case or slipped into a re-opening and testimony was brought out and there wasthing anybody could do to indicate anything but that that figure was perfectly accurate.

So we spent a lot of time and we ended up with

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exactly the same figure and there is really no valid argument about it.

The next point on which the Canadian sales were used by me with reference to -- was it Mr. Posner's testimony? Yes.

THE COURT: And the exhibits that he introduced about projected U.S. sales on the basis of Canadian shares of the total and so forth.

Now, there we get into a comparison of what Capitol presented as a kind of normal Canadian share of the total versus the share of the total here and that gets us into sales figures of other records besides the Rock-n-Roll record.

Now, obviously one would like to have all the evidence presented in the case in a state of laboratory perfection, but that seldome is done and here I wasn't engaged in measuring by computer some actual figure. I was engaged in attempting to estimate what the U.S. sales of the Rock-n-Roll album would have been had it not been for the violation of Capitol's rights by Mr. Levy and his companies.

I mean, that was one of the things I was attempting to do. That was the way that Mr. Posner's testimony was brought to bear.

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Now, when all was said and done I was interested and I gave some modest amount of attention and weight to Mr. Posner's presentation with respect to the Canadian market share feature, but I ended up making an estimate which admittedly was nothing more than an estimate and adjustment of the kind that has to be made in these circumstances.

I did not extend that estimate by any means up to the full extent of Mr. Posner's proposal. It was for short of his figures.

If I had taken his projections about Canadian market share and really used that to the full extent suggested by Capitol and Mr. Posner, I would have gone far higher than an estimate of sales loss of 100,000 records.

I would have gone up to the 150,000 mark or maybe the 200,000 mark, but I wouod have gone far higher than the 100,000.

So when all was said and done my use of that Canadian form was a very modest and very limited use.

The big factor, the major factor that I relied upon as far as statistics was the dip from -- I think the figure was --

MR. SCHURTMAN: 425.

THE COURT: 425 down to the 342 figure for Rock-n-Roo, that was the major reliance. Rightly or

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wrongly, that was the major reliance and I made that perfectly clear in the findings I dictated.

I increased,, I went slightly over the 425 to give the 100,000 -- in other words, my 100,000 represented an estimate that the Rock-n-Roll would have sold about 432,000, slightly over the 425 and in doing so I gave some modest weight to the Canadian.

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THE COURT: But to take the Canadian figures and go into them now after everybody has rested with a voluminous treatment, I must say it is out of perspective. And I also must say to you if you are going to contend that these estimates for damage purposes have to be sort of pinned down with some kind of arithmetical certainty when you know, each thing is definitely arithmetically established, let me tell you, you won't recover one thin dime on your claim nor would Capitol have recovered one thin dime on its claims, nor would John Lennon, but that isn't the law in my understanding.

It just isn't the law. No jury in a simple personal jury case would ever aware anything.

MR. SCHURTMAN: I am not suggesting that the estimates have to be made with mathematical precision obviously, but the underlying figure should be accurate.

THE COURT: Within reason, within reason. But we are not in the area. It is like, you know, it is like asking somebody to calculate everything down to 10 decimal places when you know that you are going to end up with figures that are going to end up to the nearest thousand dollars. It is a waste of time.

MR. PRETTYMAN: He is going to be comparing apples and oranges, your Honor, that is the problem. He is

not going to give you anything that is meaningful.

MR. SCHURTMAN: Will you give me two minutes to explain why I think I should be allowed to present these figures now? As I understood your Honor's decision, perhaps I am mistaken, you used the Canadian sales as, the Canadian projection of 520,000 as an upper limit and the Walls and Bridges --

THE COURT: I so stated.

MR. SCHURTMAN: And the Walls and Bridges as a lower limit. You also referred in your decision to the fact that there had been a 20 per cent drop in Capitol's overall sales due to the recession.

You referred to the fact that the Rock'n'Roll album was not a characteristic Lennon album, and you referred to the fact that it had received bad critical reviews.

Now, if I understand --

THE COURT: I appreciate your giving part of my ruling. But I also said that the other evidences of public reception were very good, including I didn't expressly state this, but I had in mind, what you so often emphasized. And that is the very high ratings on the charts.

Now, if the thing was that popular and that

highly rated, why didn't it go up to the level of at least Walls and Bridges? I mean it had some critizel reviews, but it had some awfully good reception too.

MR. SCHURTMAN: For the critical reviews. But I don't want to argue the point. I am just trying to put it in perspective. I am obviously not arguing against your Honor's findings at this point, and this is obviously not the time to do so. But it was my understanding that you took the upper limit of 520,000.

THE COURT: I so stated.

MR. SCHURTMAN: And then in effect deducted the adverse factors from this in order to get down to your 442.

Now, that is why the Canadian figures which you said in your decision were very insignificant and interesting, are of importance in this case.

THE COURT: Well, you are crediting me with more. I didn't discount that. I never quite said that. I did what a jury would have to do to try to make an estimate.

MR. SCHURTMAN: Now one problem I had with the Canadian figures, your Honor, was that you indicated after the Canadian figures were in, and after Mr. Posner had testified about them, that you had doubts about the

validity of this whole Canadian comparison.

You may recall that Capitol at that point tried to introduce a telegram to explain the Canadian comparison which you properly ruled out as hearsay and at that point Capitol rested.

Now, I must confess I was convinced that the Canadian figures after what you had said really had no weight to them, because no foundation has been laid for comparing Canada with the United States.

Mr. Posner knew absolutely nothing about Canadian conditions and then during the summations you suddenly mentioned that you thought the Canadian figures were highly insignificant and interesting.

Now shortly after that, I saw for the first time some royalty statemen ts that had been rendered to the --

THE COURT: When did you see them?

MR. SCHURTMAN: Pardon?

THE COURT: When did you see these?

MR. SCHURTMAN: After your decision, your Honor. They were called to my attention by Mr. Levy. Now, the only point in calling these royalty statements to your attention was that there was a gross distortion at the time between the royalty figure of 290,000 and the 65,000 figure.

It showed that Capitol records did sustain a 200 per cent error in the computer system for a period of one year; and at that point renewed my request to your Honor which I had made previously to please permit us some discovery on these computerized figures, so that we don't have to accept them at face value.

And I requested an audit of these figures.

Now, Mr. Prettyman and I tried to work things out during the last few days. Mr. Pretty man sent me all of the explanation which I cannot accept because I don't know what the underlying figures show, and at that point it occurred to me that since Mr. Alan Klein received certain statements pursuant to a court order of the Supreme Court showing sales figures, that maybe he would be the best source of accurate figures, because these are certified pursuant to a court order.

I then subpoenaed Mr. Klein. He has brought his records here today. The records do show discrepancies in the figures and with your Honor's permission, I think it would only take a few minutes, I would like to ask Mr. Klein to introduce these records.

THE COURT: YOu have gone over these things.

If you presented your points to Mr. Prettyman

and he has talked to you, if we are going to end up with the affairs that we did on the 29th, it is an utter waste of time. Just an utter waste of time.

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MR. PRETTYMAN: Your Honor, I would also like to point out that Mr. Levy had these royalty statements on the two songs from us all the time. On the two songs that his company has owned he says he didn't see these figures until after trial, but they had figures all before trial. And additional figures they wanted at any point, they could have subpoenaed and we could have had depositions and so forth. All of this is post-trial and I will assure you that it is going to be meaningless.

MR. SCHURTMAN: Your Honor, I could raise all of these points in the context for the motion for new trial and in the context of the motion to reopen the judgment on the grounds of fraud and I am prepared to do that, of course.

THE COURT: Well, you certainly lost on the first point.

MR. SCHURTMAN: I haven't even made the motion yet to reopen the trial.

THE COURT: You mean on the Canadian 65,000 sales. I am saying it for the fifth time because it was just a false alarm. There was nothing to it.

MR. SCHURTMAN: It wasn't a false alarm, because what you are doing is you are accepting Capitol's computer printout without giving us a chance to check them.

THE COURT: You have nothing to the contrary. You have absolutely nothing.

MR. SCHURTMAN: I have them right here; Mr. Klein's figures which he showed me for the first time this morning.

MR. BERGEN: Your Honor, Mr. Klein gets the same figures Mr. Levy does. Mr. Klein's figures come to him because he has a song on the album.

THE COURT: What does Mr. Klein add to it? You mean Mr. Levy doesn't keep his records and Mr. Klein does?

MR. SCHURTMAN: Mr. Levy's figures were based on pressings and they explained this on the basis that this was pressing not sales; and besides we forgot to crank in 60,000 units into the computer. That is what they told you the last time.

So I have been looking around for a time to figure out what sales figures are without having to accept Capitol's self-serving records at face value and the obvious source appears to be Mr. Klein, and he has given me his figures.

THE COURT: Well, the only thing, if I misled you, that I really can't allow to pass. Now I am trying to find that.

MR. SCHURTMAN: Page 3129.

MR. PRETTYMAN: I thought it would be 3469. Are we talking about how you used the Canadian figures? "I don't consider the Canadian statistics as conclusive but I think they are of considerable interest and indicative."

THE COURT: Where are you reading?

MR. PRETTYMAN: 3469.

THE COURT: But what Mr. Schurtman says is that at some earlier point I misled him into thinking that I would not rely on the Canadian figures. Now if I did this, that I will have to rectify.

MR. SCHURTMAN: Your Honor, I would rather say I was -- I don't want to say that you misled me.

(Pause.)

MR. SCHURTMAN: Starting with "Look, Mr. Granett."

THE COURT: I would like to have read back to me what you said a few minutes ago. Go back and find out what Mr. Schurtman said about me saying that I would not rely on the Canadian figures.

(Record read back.)

THE COURT: There was a discussion off the record at the beginning of the day April 1st. I think that that is referred to at page 3080. I indicated questions about whether there was sufficient factual basis about the

Canadian conditions to give significance to Mr. Posner's testimony. The problem I was really getting afte.. .apitol at that point and wondering if Capitol would present evidence. Mr. Granett was here without Mr. Prettyman and the question was would Capitol rest, would there be another witness, that kind of thing.

At a later point there was an attempt I believe to introduce a telegram. That attempt was made by Capitol and I sustained an objection. I wouldn't let it in. But at the page when I was on the record discussing this -- what was the page you gave me?

MR. SCHURTMAN: 3129 through 3130.

THE COURT: I stated quite early. Mr. Granett who was speaking for Capitol at that time said on page 3129 "Well, in view of the colloquy we had today, your Honor might feel that the exhibits that led to the Canadian figures could be taken subject to connection of Mr. Evans." Mr. Evans was the author of the telegram and I guess there was some thought Mr. Evans would come in. And I stated to Mr. Granett that I confirmed that I had indicated some doubts about the extent of proof with respect to the comparison with Canada and I recited the business about the proposed telegram and so forth.

And then I stated that I obviously would have to review the record and determine with respect to all issues whether there is proof that would permit me to base some kind of a calculation on the Canadian comparison. I said I have not done it at that point and that I would review the whole body of evidence as carefully as I can and I told Capitol that they had to proceed and rest; that I was not going to leave the case open for them to determine whether they would bring in a Mr. Evans or not and I put the bite on Capitol to finish, either bring evidence in then and there or rest.

I said in effect that I would consider the evidence on the basis of what was in the record, see what it meant and that was that. I don't see how anybody could be misled to believe that the Canadian figures somehow weren't in for whatever they were worth. I didn't know what they were worth at that point. They might be worth a lot, they might be worth little, and so I stated to counsel. Capitol rested and I put on your case and you had a job to put on your case, just like Capitol did. I forced Capitol to rest. I didn't force them to rest, but I didn't hold the case open for a lot of other proof.

I think the same thing should be true for you. I am not going to reopen the case to hear additional

material about Canadian sales. What was in was in. I made my findings on the basis of it and that's that.

MR. SCHURTMAN: Your Honor, may I respectfully make an offer of proof as to what I would hope to establish through Mr. Klein?

THE COURT: Okay.

MR. SCHURTMAN: Would you want the offer of proof through the witness or would you want me to make a statement?

THE COURT: Just make a statement.

MR. SCHURTMAN: I would offer to establish through Mr. Klein that the Canadian figures that he has received from Capitol, directly or indirectly, I think he gets them through Apple pursuant to a court order, are not comparable to the figures that were presented to your Honor. There was a discrepancy both in the case of Rock and Roll and in the case of Walls and Bridges and I would hope to bring this discrepancy to the court's attention.

I respectfully reserve the right to make appropriate motions under the rules.

THE COURT: Your motions for a new trial and all -- we are dealing with that now. You would be wasting your time going at it in another forum.

MR. SCHURTMAN: In any event, your Honor, for

the record so some appellate court could see what I was trying to do, I would be prepared to make a motion for a new trial under Rule 59 and the motion to reopen any judgment you may enter on the grounds of fraud with respect to the Canadian figures.

THE COURT: Yes.

MR. PRETTYMAN: And I in turn, your Honor, would make an offer --

THE COURT: I want to know your position. Do you take the position that the record should be reopened or do you object to it?

MR. PRETTYMAN: I object to it.

THE COURT: All right.

MR. PRETTYMAN: But I would make a counteroffer that if any such offer were made I would put witnesses on the stand to prove that any differences between figures which Mr. Schurtman would produce and the figures which we produced in court are entirely and completely correct I believe for my one or more of four factors of: Either finished goods sold to foreign licenses, goods sold to PX and export and domestic exporters, by free goods and by reserves.

THE COURT: What are the meanings of those terms? I am not familiar with those. What do you mean?

MR. PRETTYMAN: Reserve, your Honor, is since you do not know when an album comes out how many returns there are going to be, you set up a reserve so that in the next month -- for example, if you had a tremendous number of returns, you wouldn't have paid in so much money on your royalty statement which you could never get back and consequently companies -- it's a formal practice -- set up a reserve so they don't pay the entire royalty the first month, you pay it and your reserve lessens as you go down and at the very end, when the record is entirely sold, your reserve is out and you pay a completely accurate royalty figure, but for the first few months it is really not an accurate figure because you were saving something back so that you don't get stuck by paying out too much at once. That's one of the factors.

THE COURT: In other words, on a certain type of bookkeeping the sales figures in terms of what was actually sold might appear to be reduced because of the holding of a reserve?

MR. PRETTYMAN: Sure. Because you send out 100,000 copies in your first month. Let's just take a figure. You are not going to pay a royalty on 100,000 because in fact 95,000 of those may come back the next month and once you have paid your royalty there is no way

of getting that money back. They won't pay it back to you. Once you have paid it to them you have lost it, so you set up these reserves which are fairly large in the first few months and tend to diminish and you will remember that in the figure in the last letter I wrote you the reserve on that I believe of Walls and Bridges was down to some very small figure because that had been out for sometime. That's one way to account for it.

Another is a difference of free goods. If free goods are given out, so free goods figures show up on some items and not on others.

THE COURT: What's free goods?

MR. PRETTYMAN: Free goods are albums that you give out free to people so that they can play them on the radio and things of that sort.

THE COURT: Are they included in the sales figures?

MR. PRETTYMAN: It's my understanding that as to publishers' figures, royalties are paid on some free goods and not on others. I do not believe that they are shown -- I would have to get my witness here, but I am not sure whether they are shown or not on which of these figures.

THE COURT: How does free goods affect it? In

other words, would the royalty statements received by a publisher tend to be higher or lower because of this free goods thing?

MR. PRETTYMAN: Can I ask Mr. Posner that because we haven't had a chance to talk. He just arrived.

THE COURT: Yes.

MR. PRETTYMAN: Mr. Posner, would you answer the question?

MR. POSNER: Higher, most likely.

MR. PRETTYMAN: So my offer of proof is simply because of four factors, the figures which we would present to you would be different than the figures that we presented to you, but the difference would be wholly accountable for and that the figures that we gave you were accurate for the purposes that we gave them to you for. That's simply my offer of proof.

THE COURT: How much time and how much documentation would it take to produce your material? We have everybody in court.

MR. SCHURTMAN: Are you addressing me, your Honor?

THE COURT: Yes.

MR. SCHURTMAN: I believe Mr. Klein would take about 10 or 15 minutes at the most.

THE COURT: I know we spent a long time arguing about this, but I suppose --

MR. PRETTYMAN: If he is going to introduce the figures that I think he is then it's going to take us a while to explain it. We may be here a day or so. I am prepared to go ahead if you want.

THE COURT: How long do you think it would take to explain it? If this -- you know, we are having all these fireworks about whether -- if it's a matter of an hour --

MR. PRETTYMAN: There is no way.

THE COURT: We can spend an hour and then we don't worry about it.

MR. PRETTYMAN: I can only tell you that --

THE COURT: But if it's a day and a half, there are other things to do in this court house.

MR. PRETTYMAN: What is your estimate, the two of you gentlemen, as to how long all of this would take?

MR. POSNER: Of this document you showed me, 15 minutes.

MR. PRETTYMAN: That's the one Canadian --

THE COURT: Exactly what issues are we talking about? I want to know before we start and I want a limit. I do not want one thing to lead to another thing endlessly. What are you talking about, Mr. Schurtman?

MR. SCHURTMAN: We are talking about the accuracy of the Canadian figures that were given to your Honor.

THE COURT: What Canadian figures?

MR. SCHURTMAN: With respect to Rock and Roll and Walls and Bridges.

THE COURT: Those two albums and that's the end of it?

MR. SCHURTMAN: I am trying to limit it, but Mr. Cancer points out that there is a discrepancy on every one of the songs that was given to your Honor.

THE COURT: What do you mean every one of the songs?

MR. SCHURTMAN: They gave you averages based on six John Lennon songs in Canada and there is a discrepancy I am told as to every one of these figures.

THE COURT: Individual songs?

MR. SCHURTMAN: Rock and Roll -- I am sorry, I shouldn't say songs. I am confused. I mean albums.

THE COURT: You mean we are going into six albums?

MR. SCHURTMAN: I was trying to limit it to show your Honor the discrepancies in Rock and Roll and Walls and Bridges, but I am simply pointing out there are discrepan ies as to the other albums, too.

THE COURT: I will let you put it in. If it ends up that you are wrong I am going to fine you and your client or I am going to impose costs commensurate with the ample allowance for attorneys' time.

MR. SCHURTMAN: I object to that condition, your Honor.

THE COURT: You are raising a point which could and should have been gone into in the ample amount of time that we had for the trial of this. I will allow you to raise this now. If it turns out that it's another blind alley I will impose costs and fees upon your client accordingly.

MR. SCHURTMAN: Your Honor, I respectfully decline to proceed on such a condition. I will then make an appropriate motion under the rules instead and bring it up in that fashion.

THE COURT: In other words, the amount of legal time necessary to deal with this, you would not be willing to pay in order to get this before the court if it turns out that you are wrong and that it all dissolves, you don't feel you should pay for the time of the lawyers involved?

MR. SCHURTMAN: Your Honor, it would turn out that I am wrong if your Honor finds that the figures are

satisfactory just as you found that the 200 per cent error last week was satisfactorily explained away. Now, I don't believe that I am required under the rules to proceed under such conditions, with all due respect to your Honor, and if those are the conditions you wish to impose, then I would rather seek my other remedies under the rules.

THE COURT: I will give you an alternative. At the lunch hour you go over it. Do you know what Capitol can put in in response to your contention?

MR. SCHURTMAN: No.

THE COURT: You don't?

MR. SCHURTMAN: I have had no discovery. One of the purposes of my letter, your Honor, which I would incidentally like to mark for identification so that it will be part of the record, was an application for discovery and permission to conduct an audit.

Now, we have repeatedly requested discovery on the issue of damages. Your Honor denied the requests in the past, but now that we have proved a 200 per cent error in these computer records, I believe we are entitled to renew our request for discovery and perhaps the appropriate way to handle this, your Honor, and I suggested this before, is to permit us to conduct out of court discovery so we don't have to take up the court's time and then once

the discovery has been completed and each side knows what the other is going to prove we can then ask your Honor for a short hearing.

THE COURT: Why can't you find that out now? I will recess, you get together with the other side and you see what they have got. I want some realism on your part. I think you were totally unrealistic on that Rock and Roll thing and we will come back.

(Continued on next page.)

MR. SCHURTMAN: Very well, I will do it during the lunch hour.

THE COURT: No, we will do it right now.

MR. BERGER: Your Honor would just like to register on the record an objection to reopening the case.

THE COURT: All right.

MR. PRETTYMAN: Mine too.

THE COURT: My feeling is we have all these people here. It is a waste of their time to come and not have some better resolution than we are doing now. I think that perhaps we can all be aided if Mr. Schurtman can get together with Mr. Posner, he is here, and Mr. Klein, who is here, and you exchange information.

Do it informally. If you have to go on the record, I am sure you can do it faster than if you are groping blind. I will recess and await your call and be ready to put on whatever you want. You may put on nothing or you may put on something, and hopefully it will be very short, and then we will have this thing over in about an hour and that is the end of it.

MR. SCHURTMAN: Thank you.

MR. BERGER: I have two witnesses here on the other claim.

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THE COURT: Mr. Kanzer, why can't you devide your forces? Mr. Kanzer can get with --

MR. SCHURTMAN: Fine.

MR. PRETTYMAN: It is okay with me, because I am not involved with the other part.

THE COURT: That is a good way to handle it. Mr. Klein, Mr.Posner, Mr. Prettyman, Mr. Kanzer, all you people go out and you can work in the jury room.

MR. SCHURTMAN: Would you give me one minute to confer with Mr. Kanzer?

THE COURT: Sure.

(Pause.)

MR. SCHURTMAN: I have a logistical problem. My accountant and Mr. Levy are advising me of the musical aspects.

THE COURT: I can't help it. Do the best you can. Y ou have four people with you. You can split up two and two. Do it any way you want to.

MR. SCHURTMAN: All right.

(Pause.)

THE COURT: Mr. Bergen, you have a witness?

MR. BERGEN: Yes, your Honor. I would like to recall Mr. Deutch.

MR. SCHURTMAN: Before he calls Mr. Deutch, I

was in the middle of cross-examination of Mr. Strauss.

MR. BERGEN: Mr. Strauss will be here. You interrupted your witness.

THE COURT: We will go on with whoever was here.

M U R R A Y D E U T C H resumed.

THE COURT: You are still under oath, Mr. Deutch.

MR. SCHURTMAN: Just for the record, I would like to register an objection to Mr.Bergen calling back the same witness who he had an opportunity to cross-examine.

THE COURT: Has he rested?

MR. SCHURTMAN: No, not as far as I know.

THE COURT: Then the objection is overruled.

DIRECT EXAMINATION (continued)

BY MR. BERGEN:

Q Mr.Deutch, I would like to ask you a hypothetical question. First, are you familiar with a song called Angel Baby?

A Yes, I am.

Q It was a hit a number of years ago by a group called Rosie and The Originals?

A I really don't remember, but I think I know

the song. It has just been recorded if I am not mistaken by -- it could be Helen Reddy, but I don't know.

Q I would like to ask you a hypothetical question. Assume that John Lennon came to you as a publisher, you are a publisher, and Mr. Lennon proposed the following arrangement to you. He says, I will record your song from your catalog, Angel Baby, in my next album, and it won't be a single, and you will agree as the publisher that you will waive the payment of mechanicals on the record and if there is any performance income attributable to that song, it will be paid to Mr. Lennon and not to the publishing company.

Therefore, the only way you would stand to gain from Mr. Lennon recording the song would be from income from the so-called cover records following Mr. Lennon's recording.

Then Mr. Lennon says to you, how much will you pay me to record that song?

What would your response be?

MR. SCHURTMAN: I object to that type of thing.

THE COURT: I didn't even understand it. I am sure it is understandable, Mr. Bergen, but I have got to think a minute.

MR. BERGEN: What I am trying to show, your Honor --

THE COURT: You cannot hypothesize Lennon would waive mechanicals.

MR. BERGEN: The publisher would waive mechanicals and performance income also so that all he would really be getting from Mr Lennon recording that song would be the enhancement value to the copyright, what would follow after Mr. Lennon recorded the song in terms of cover records, mechanicals from the cover records, performance income from the cover record.

THE COURT: In other words, Mr. Deutch would be making a deal. Mr. Deutch owns the copyright on Angel Baby in the hypothesis?

MR. BERGEN: That is correct.

THE COURT: In effect he wants to get John Lennon to record this in order to get a lot of enhancement cover records and so forth.

MR. BERGEN: That is correct.

THE COURT: How much would he --

MR. BERGEN: What would be the value to him to have Mr. Lennon record that? In other words, what would he pay Mr. Lennon.

THE COURT: In other words, he wouldn't have

to be paying Mr. Lennon any mechanical royalties -- wait a minute, who pays?

MR. BERGEN: The money from the sales of the record, Mr. Deutch's publishing company gets the mechanical royalties and he also gets the performance royalties.

THE COURT: So instead of Mr. Lennon paying him he would be paying Mr. Lennon to record --

MR. BERGEN: To record the song.

THE COURT: Is that enough of a -- do you have an opinion on that? I mean, can you answer that?

THE WITNESS: I think I can.

THE COURT: Okay, go ahead and do it. Let me just make a note. You can think a minute.

MR. SCHURTMAN: Your Honor, I would have an objection.

THE COURT: I will overrule your objection in view of the fact he says he can answer.

Okay, go ahead and answer.

A I wouldn't make the deal.

Q You wouldn't make the deal?

A Absolutely not. Y ou asked me a question would I pay John Lennon to record the song?

Q Yes. Bu wouldn't?

A Absolutely not.

Q So it wouldn't be of any value to you to have John Lennon record your song if you were going to waive the mechanicals and waive the performance income?

A I want to answer this way, the following: If he records my song and he takes away all the income there is no income for my publishing company.

Q No.

A Just a minute.

Q Okay.

A The point you are trying to get out of me is because he may record the song and there is no income somebody else around the world may do it because he is one of the great artists. I may agree with you, but my company doesn't pay anything to do any songs. You said in the beginning that he approached me to do that song. We wouldn't do it. We just wouldn't do it.

Q The point I am trying to bring out, Mr. Deutch, is that it wouldn't be of any value to have John Lennon record a song owned by your publishing company if you were not going to get the mechanicals and performance income on that song, on that record?

A That is not what I said. It is a value to

have John Lennon record it, but not under those circumstances.

Q That is what I am saying. So it isn't of value because you wouldn't pay him anything to have him record the song?

MR. SCHURTMAN: I renew my objection.

THE COURT: You are distor ting.

MR. BERGEN: Your Honor, that question to Mr. Deutch is precisely Big Seven's case.

MR. SCHURTMAN: No, it isn't.

THE COURT: No, it isn't precisely at all.

MR. SCHURTMAN: Because the enhancement of the copyright includes income to be generated by Mr. Lennon over the life of the copyright.

THE COURT: The point is, Mr.Deutch, and I think you have explained it. Why wouldn't you make this deal? Why wouldn't you make the deal that Mr. BErgen asked you about?

THE WITNESS: We don't pay artists to record our songs. We go on the basis of the song.

THE COURT: I think that is clear.

MR. BERGEN: No further questions.

THE COURT: Okay, Mr. Deutch.

MR. SCHURTMAN: We have nothing.

(Witness excused.)

MR. BERGEN: I call Irwin Robinson.

I R W I N R O B I N S O N, called as a witness by the defense, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERGEN:

Q Would you state your home address, Mr. Robinson?

A 1441 Dartmouth Street, Baldwin, Long Island.

Q By whom are you employed?

A Columbia Pictures Industries, Inc., their music division, Screen Gems Columbia Music.

Q Are you a lawyer?

A Yes, I am.

Q What state are you admitted in?

A New York State.

Q Can you give us your background since graduation from law school?

A Well, I started wor king in the music publishing business while I was going to law school in the evening. I have been in the music publishing business for 19 years and I graduated from law school in 1961, had a private practice for a while and then went to work for Columbia Pictures in 1964, as house counsel. Since then

I have become vice-president and general manager of that company.

Q Are you also a musician?

A Yes, sir.

Q Can you tell us what your duties are in your position at Columbia?

A Well, my responsibilities are the day-to-day -- running the day-to-day operation of the company and within the scope of that comes the responsibility for the professional department that judges musical compositions and their value and their worth to other artists who might record them.

THE COURT: I am very sorry, I missed that. The company you said was Screen Gems?

THE WITNESS: Screen Gems Columbia Music. It is the musical division of Columbia Pictures Industries.

THE COURT: I am not clear again, are they are publisher?

THE WITNESS: Yes. A publishing company. They own copyrights.

THE COURT: And you are what, vice-president?

THE WITNESS: And general manger.

THE COURT: Okay, go ahead.

Q Are part of your overall responsibilities, Mr.

Robinson, to supervise the copyright aspects of Screen Gems' business?

A Yes.

Q Can you tell us how many copyrights, approximately, Screen Gens owns of songs?

A About 20,000.

Q Does Screen Gems have a large number of Rock and Roll songs in its catalog?

A Yes, I would say that the great proportion of the catalog was acquired and was exploited during the Rock and Roll era.

Q Would you sy that Screen Gems Rock and Roll catalog is larger than any other publisher?

A I would say so.

Q Now, in your experience as an attorney and with Screen Gems, have you become well-versed in copyright law?

A Yes.

Q And also as to the legal problems relating to copyrights?

A Yes.

Q How many years have you devoted to this area of the law?

A Well, since graduation, '61 through '76.

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Q Can you tell us any boards of directors that you are on?

A I am a member of the board of directors of ASCAP, which is a music performance licensing organization.

I am a member of the legal committee of that board as well.

I am a member of the board of the national music publishers association, and the chairman of the legal committee of that board. I guess that is about it.

Q Are you a member of the board of Harry Fox?

A I am sorry, the Harry Fox Agency which is the agency that collects mechanical royalties for the majority of music publishers.

Q Can you describe briefly what National Music Publishers Association is?

A It is a trade organization made up of publisher members only. Their interests are to promote music publishing and copyright ownership and protection throughout the world.

Q Are you familiar with John Lennon?

A Yes.

Q Are you familiar with Mr. Lennon's reputation as not only a record artist but a songwriter?

A Absolutely.

Q You are also aware that he performed with the Beatles?

A Yes.

Q Can you tell us in your opinion what Mr. Lennon's position is in the music industry,his stature?

A I would think that he would be deemed to be a very creative and talented individual. As far as ranking, I don't think I could rank him in any particular position.

Q Can you tell us what a cover record is?

A A cover record is any record which is recorded and released after the initial record.

Q Do you know why they are called cover records, where that term kind of is derived from?

A I am not sure I go back that far.

Q What is your understanding of why they are called cover records?

A Well, they originally I think what you are talking about is the fact that when an artist came out with a record and someone else had a recording of the same song, they would cover that artist. They would attempt to compete with it or knock it out of the box, but it would be a competing or second record.

MR. SCHURTMAN: Your Hoor, at this point I

would like to state an objection to the testimony of this witness on the grounds that he appears to be an expert whose name was not disclosed to us. Simply the same objection that Mr. Bergen made when I called my people so we can get a ruling on it.

THE COURT: All right.

Overruled.

Q Are cover records also like an attempt to capitalize on an earlier hit of a song?

A Yes. That can be one reason for a cover record.

Q Can you distinguish between t he value to a publisher of the performance of a song as one of approximately 10 or more tracks on an album, and the same song as the A side of a single?

A I think the single record performance is infinitely more valuable, because it as opposed to the album recording of the song, makes the song popular. It is what is probably played most on the radio, listened to by millions and millions of people. If the single record is successful, then very often the album will be successful.

However, if the single record is not successful very often an album will not be successful.

Tracks recorded in an album are very often rarely or sometimes never played on the radio.

Q Is there a large difference in terms of mechanical income if the single is popular?

A There can be, yes, and certainly a large difference as to performer's income.

Q And you also said there is a difference in the exposure between one track of an album and a single?

A Yes, the likelihood is that an album son sometimes may never be exposed other than in that album.

Q Are you familiar with a songle called Ya Ya?

A Yes.

Q Are you also familiar with a songle called Angel Baby?

A Yes.

Q Have you heard both of those songs?

A Yes.

Q Have you heard the original version of Angel Baby by Rosie and The Originals?

A I have.

Q I would like to ask you a hypothetical question. Assume that Ya Ya is recorded in Album No. 1 and that it generated some mechanical income and some performance income.

Assume that it was later recorded by John Lennon and assume that the mechanial income and performance

was more or less the same. And finally, assume that Angel Baby was superimposed to be substituted for the second version of Ya Ya. In other words, on the second album. In your opinion would it be important, and would you feel that there was not an enhancement of the value of Angel Baby because it was not recorded and Ya Ya was?

THE COURT: I don't understand that. Wait aminute. You have got Album No. 1 with the original recording of Ya Ya.

MR BERGEN: That is correct, your Honor.

THE COURT: Then you have later recording by John Lennon of Ya Ya.

MR. BERGEN: That is correct.

THE COURT: What are you calling that, Albaum 2?

MR. BERGEN: Both records of Ya Ya were by John Lennon.

THE COURT: In other words,John Lennon is doing it on the Album 1. I got you.

And Album 2.

MR. BERGEN: That is correct.

THE COURT: And then your question. Go back.

MR. BERGEN: Then I said assume that Angel Baby was superimposed to be substituted for the second version of Ya Ya on the second album, but it wasn't.

MR. SCHURTMAN: I object to this hypothetical as having no relation to the facts of this case.

THE COURT: This is one phase that I keep forgetting.

MR. SCHURTMAN: Lennon was superimposed to record three songs. One of them had to be You Can't Catch Me. The other two were at his election. He indicated initially Ya Ya and Angel Baby. He recorded Ya Ya the first time in Walls and Bridges without reference to the settlement. He testified that it had nothing to do with the settlement.

MR. BERGEN: There was no testimony about this at all.

THE COURT: You Can't Catch Me, and Angel Baby were not on this.

MR. SCHURTMAN: Then on the second album he recorded You Can't Catch Me, he recorded Ya Ya, and he was going to include Angel Baby and then with Mr. Seider's concurrence, he dopped it. That is the state of facts. There is nothing in the record to say that he was going to substitute Angel Baby for Ya Ya in the second record.

THE COURT: Except that your contention is Ya Ya should not have been repeated or at least that wasn't any compliance with the settlement agreement, right?

MR. SCHURTMAN: We are saying that Ya Ya in the second record was in compliance with the settlement agreement. We are saying that when he recorded Ya Ya the first time around, that was not compliance.

THE COURT: I think that I will allow the question.

MR. SCHURTMAN: He simply picked the song.

THE COURT: But what is your question?

MR. BERGEN: I don't want my silence to indicate that I agree with Mr. Schurtman. Ya Ya was in the album, they got royalties.

Q My question was given that hypothetical set of facts, Mr. Robinson, would you feel that there had not been enhancement of the value of Angel Baby because Angel Baby was not recorded and Ya Ya was?

MR. SCHURTMAN: I object.

THE COURT: Let's let the witness answer. Can you answer that?

A I think I can answer it. I assume that in answering the question, that Ya Ya attracted the same mechanical royalty.

Q That is correct.

A That Angel Baby would have in the album, so

so that two cents for two cents, he came out pretty much, the songs were prett y much even. I wouldn't have cared really which song was recorded.

THE COURT: Wait a minute. Your question was whether there would be ehhancement. Phrase your question once more.

MR. BERGEN: My question is that it doesn't make any difference to Mr. Robinson whether John Lennon recorded Angel Baby or Ya Ya, he got the mechanical royalties and whatever performance income he may have gotten from that song.

THE COURT: Doesn't it depend on what it is that you are trying to seek the value of?

MR. BERGEN: Yes, and I am trying to seek what the value is to Mr. Robinsnn as a publisher, the ehhancement value.

THE COURT: The enhancement value is something that is different from just straight mechanical royalties payable from John Lennon,isn't it?

MR. BERGEN: Mr. Lennon doesn't pay the mechanical royalties, but the payment from the record company, that is correct, but we assumed that the mechanical royalties would be the same and I am again getting at this point that

assuming that the mechanical royalties are the same, what is the value to a publisher down the road in terms of the enhancement value and getting original pepople to record that song because John Lennon recorded it, which is the thrust of the plaintiffs' --

THE COURT: I missed something. Now, the hypothetical case was that Ya Ya was recorded twice, Angel Baby not recorded at all?

THE WITNESS: Yes.

THE COURT: And you are telling us that if you are just looking for straight mechanical royalties on songs, that if Album 2 sells X hundred thousand records, it doesn't make any difference to you which of your songs are on it. You get the royalties, right?

THE WITNESS: That is correct.

THE COURT: Now, there has been another thing talked about here and that has been called the enhancement of the copyright by virtue of cover records.

THE WITNESS: That is right.

THE COURT: Now I take it if Angel Baby is not recorded then at least by that much, there is nothing to enhance the copyright value of Angel Baby by virtue of a recording, if there isn't a recording, that is obvious, isn't it?

A Yes.

MR. BERGEN: I think the question was framed, your Honor, the witness' testimony was that there isn't any value to him of having either Angel Baby or Ya Ya recorded in terms of enhancement. Enhancement down the road.

THE WITNESS: May I rephrase the answer? Maybe make it a little bit more clear?

THE COURT: Rephrase it.

A If the question you are asking is whether or not a recording of Angel Baby by John Lennon as opposed to Ya Ya would have a value beyond a John Lennon record, that is the enhancement that you are talking abou t?

THE COURT: Right.

A Knowing the two songs as I do, I don't think that John Lennon's recording Angel Baby would give the song any more credence to artists to record after his record than it had credence for artists to record before John Lennon's record.

THE COURT: Okay.

Well, that I didn't understand before.

Why do you say that?

THE WITNESS: I say that because in the publishing business, the value of a song,the judgment as

to a song's worth, is always based on the marketability of that song to other artists. Who will record it, who will cause it to earn money in the future. If a song is not particularly attractive to artists, the fact that a name artist records it in an album, will not make it any more attractive. In the first instance, an artist who records a song, who is looking to make hit records, is looking for the best possible song for his repertoire, and if Angel Baby in my estimation is not a song that will fit very many artists in the future, it won't become more fitting to artists because it was recorded by John Lennon.

THE COURT: You are saying -- you are familiar with Angel Baby?

THE WITNESS: Yes.

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THE COURT: And this is a judgment based on the characteristics of that song, is that right?

THE WITNESS: Of that song or any song like it, yes.

THE COURT: What are the characteristics that cause you to say that?

THE WITNESS: Well, there are certain kinds of songs in our industry which are more recordable than others, obviously. The particular record of Angel Baby that the original record by Rosie and the Originals was a hit record in my opinion because of its sound and the nature of the artist and the time in which it was released.

I am not sure, but I would venture a guess that after that original hit record, not too many people recorded that song.

THE COURT: Why was that a hit originally did you say?

THE WITNESS: I think it was a hit originally because of the sound of the group that recorded it, and it was a song that was marketable within a particular time frame in our industry. I think that in the hands of a good publisher if that song had been marketable beyond that time period, the publisher would have done a job and secured other cover records in albums by other artists.

I don't know if that was done, but I don't remember that the song attained any degree of popularity after the original record.

THE COURT: So you would doubt there would be many cover records?

THE WITNESS: At any time whether or not John Lennon recorded it or not.

THE COURT: You think if there were to be cover records, you could have had cover records from the time of the original recording, because that was a hit?

THE WITNESS: Yes.

THE COURT: Go on.

Q The record I am referring to is Defendant's Exhibit DT. The record in this case indicates that since the Rosie and the Originals version in 1960, there have been only four cover records in approximately 16 years. Is that what you were talking about?

A Yes.

Q And that those four cover records were by the following artists: Kathy Young, Vicky Vote, Ray Perotta and the Delrons, and a Maxine Brown. Are any of those artists well known to you?

A I would say the last two names that you mentioned Ray Perotta and the Delrons and certainly Maxine Brown

is a known artist. I don't know the other two.

Q When you talk about a sound, the sound of this record, is there such a thing in the business as a sound hit as opposed to a song hit?

A Yes, I would say so.

Q Can you describe what these two terms mean?

A Well, it is very difficult except perhaps by comparison. I can pull one out of air. Several years ago perhaps almost the same time period, there was a record called Tequila by a group called the Champs which was a very ordinary instrumental recording of some often done cords done in slightly different way and there was a gimmick to the record. Suddenly somewhere in the instrumental, a very low bass voice came in and said "Tequila" and because of the sound of that record, it became quite opoular.

I doubt that too many other people recorded that song with very much success. The old record is played from time to time, because of the nature of the sound.

By comparison, you take some of the so-called contemporary standard songs of today, created during the same time period perhaps, perhaps a song written by Carole King who happens to be one of our writer artists which has sustained and become recorded let's say in the same

time period of ten or twelve years, some 50 or 60 times.

Q What would that song be by Carole King, can you think of one?

A Yes, "Will Your Love Me Tomorrow" might be one.

Q Would you characterize and you may have said this already, would you characterize the original version of Angel Baby by Rosie and the Originals as a sound hit?

A I would.

Q Let me ask you another hypothetical question, Mr. Ribonson.

Assume that Mr. Lennon came to you and this is basically the same hypothetical I posed to Mr. Deutsch.

A Would you pose it again?

Q Yes. Assume that Mr. Lennon came to you and said I will record your song Angel Baby in my next album. It wouldn't be a single, and you will agree, you the publisher will agree, to waive receipt of mechanicals on the record and if there is any performance income on the record, you will waive that also and it will be paid to me John Lennon.

How much would you pay Mr. Lennon to record that record?

MR. SCHURTMAN: Object to this question.

THE COURT: I will see if he can answer it.

Can you answer that?

THE WITNESS: Yes. I would have to say I would pay him either nothing or what I might pay somebody to make a demonstration record, if I needed a demonstration record.

Q Can you describe what a demonstration record is?

A Yes. A demonstration record is a record which is not made for commercial release, which is used to show to artists, to induce them to record the song.

THE COURT: Why is that? Why wouldn't you?

THE WITNESS: Well, what I was saying, your Honor, is that if I had a song like Angel Baby done only in its original style, and I were the publisher attempting to show that song to other people, I would think that using the original record might be detrimental because it is old fashioned, and it is not a very good demonstration of the song.

So that I might go in as a publisher and get other people to go in and make a new version of it, maybe bring it up to date, maybe make it, try to make it more acceptable if it was a piece of property that I owned and I wanted to exploit it.

So that if I thought that John Lennon's recording

of it would be more up to date, and make it more acceptable I might pay the value of a demonstration record to do that, if I had to pay anything. But on a policy basis, I don't like to pay anybody to record our songs.

THE COURT: Anything else?

MR. BERGEN: Yes, your Honor.

Q If in this set of facts that we were talking about before, if Angel Baby had appeared in the second Lennon album as opposed to Ya Ya, would the enhancement value of the copyright of Angel Baby be $179,000?

A No.

MR. SCHURTMAN: Object on the grounds that he is substituting Angel Baby for Ya Ya. There is nothing in the record to support that.

THE COURT: We will know he is just asking. You are contending that you were deprived of the loss of enhancement value of Angel Baby, right?

MR. SCHURTMAN: Or some other song.

THE COURT: Some other song. The only one we have heard about that was explained was Angel Baby.

MR. BERGEN: And it was in fact recorded not only complied. You Can't Catch Me and Ya Ya were recorded.

MR. SCHURTMAN: But I am talking about Mr. Bergen's instant reference to a substitution. Let's cut that.

In other words just change it to recording of Angel Baby. I don't think it makes any difference.

Q Okay, recording of Angel Baby. Would that be worth $179,000?

A No.

Q Would it be worth $96,000?

A No.

THE COURT: In other words, you are saying a John Lennon recording of Angel Baby would not be worth, would not enhance the value of the publisher's copyright to the tune of 179 or 96 or whatever?

THE WITNESS: No, your Honor, it would not.

Q Would it enhance it to the tune of 1,000?

A If that might be the value of a demonstration record, it might. I don't know what I would pay for that, it is possible.

Q But it wouldn't be any more than that?

A No, it would not.

THE COURT: What if John Lennon recorded a so-called standard, or what you call a song hit, or a potential song hit?

THE WITNESS: Well, your Honor, in answer to that, I have some comparison perhaps of some copyrights within our own catalog which are songs that have been

recorded very often, perhaps 50, 60, 100 times by various people which have been included as album cuts by artists of stature. And these album cuts have not further enhanced or caused other immediate recordings of those compositions.

So it is possible that even with a better quality or more exploitable song.

THE COURT: What is the usual experience?

Q Can you give us some of the examples that you are talking about, Mr. Robinson?

A Can I refer to some notes?

THE COURT: Of course you can.

A As an example, we have a song called "Up on the Roof" which was a major hit by the Drifters in 1962.

THE COURT: What is the name?

THE WITNESS: Up on the Roof.

THE COURT: Recorded when?

THE WITNESS: In 1962, it was the first time the song was a hit.

THE COURT: The Drifters?

THE WITNESS: Yes. Nine years later in 1971, it was recorded by a very big artist Tony Orlando and Dawn who now have a national television show. And the song hasn't been recorded since. It was just recorded on an

album of course. All these are situations where they are album cuts.

Another example is a song called "Everybody's Somebody's Fool," which was a hit by a very well known artist Connie Francis.

THE COURT: What is the name again?

THE WITNESS: I am sorry. Everybody's Somebody's Fool, which was a hit by Connie Francis in 1960 or 15 years later it was recorded in an album by Marie Osmond that sold about 600,000 albums.

THE COURT: In an album by whom?

THE WITNESS: Marie Osmond. Part of the Osmond family; she's also the subject of a national television show right now.

Q Is she a major artist?

A Yes, I would say so. And Everybody's Somebody's Fool has not had any recordings since that time. I have two or three more.

Q Could you give them to us, please?

A Yes. We had a song called "Spanish Eyes," which was a hit in 1967 by Al Martino. It was recorded by Elvis Presley eight years later in an album and has not been recorded since.

We had a song called "A Little Bit Me, A Little

Bit You," which sold about 2 million records by the Monkees as a single record in 1967, which was recorded in an album by Donnie Osmond in 1971, and has not had any enhancement since that time.

And in the same album by Donnie Osmond there was another song called "Take Good Care of My Baby," which was a huge record by Bobby Vee in 1961 which has not been recorded thereafter.

Q Mr. Robinson, can you tell us what factors might determine whether later artists would rerecord a particular song?

A Well, in my opinion the factor that always determines it is whether the song is acceptable to the artist. Does the artist considering the song have a reasonable expectation of making a commercially saleable recording of the song. There is always the judgment factor as to whether a song is recorded. It is both the artist's judgment and the producer's judgment, the person who produces the record.

(Continued on next page.)

Q Is there any way of estimating whether cover records will be made of an album track of a particular song by a major artist like John Lennon?

A I would say it would be very difficult. It would be very difficult to do.

Q Is there any way of estimating how many cover records there would be following such a recording?

A No.

Q Is there any way of estimating the income from any of these cover records?

A I don't think so.

Q Are you familiar, Mr. Robinson, with the term speculative damages?

A Yes.

Q Have you become familiar with that term during your career as a laywer?

A Yes.

Q In your opinion would you say that damages for the failure of John Lennon to record Angel Baby or another song would be speculative?

MR. SCHURTMAN: Objection, your Honor.

THE COURT: Sustained.

MR. BERGEN: Your Honor, I would just for the record state that under Rule 704 of the federal rules of

evidence, I believe that Mr. Robinson is qualified to give such an opinion.

THE COURT: I will sustain the objection.

MR. BERGEN: No further questions.

THE COURT: Let's take a short break.

(Recess.)

MR. SCHURTMAN: May I proceed?

THE COURT: Yes.

XXX CROSS EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Robinson, you gave the court a number of examples from your catalog of songs that had been re-recorded by hit artists where there were no cover records.

A Yes.

Q Did Mr. Bergen ask you to select songs which would reflect that?

A I don't think he directly asked me that question. I knew the substance of --

Q What did he ask you to look for?

A He didn't ask me to look for anything.

Q Did he ask you to bring in some examples of songs that had been recorded by hit artists and would not reflect cover records?

A No, but I thought that considering the issue

in this case I could best make my testimony clear by doing so.

Q Did you also look into your catalog for examples of songs that had been rerecorded by popular artists and where you had subsequent cover records?

A I looked through the catalog for various kinds of examples. I did not find songs that had substantial cover records after being recorded in an album by an artist.

Q Are you saying that in your particular catalog, and I assume that's -- what is it?

A Screen Gems,Columbia, are it.

Q In the Columbia catalog, that you couldn't find any instance of a song being rerecorded by a popular artist which was done followed by cover records?

A In the case of a rerecording as a single record I did, but not not to my recollection in an album.

Q You couldn't find any instances?

A No.

Q Let me ask you about the single recording. If Mr. Lennon had recorded Angel Baby as an album --

THE COURT: A single?

Q No, if he had recorded Angel Baby as one of the tracks of an album, is it possible that Angel Baby would

have been released as a single?

MR. BERGEN: That is just conjecture because there was no obligation that it be released as a single.

MR. SCHURTMAN: There was no obligation that it not be released as a single.

MR. BERGEN: There is no such thing as an obligation that it not be released.

THE COURT: I don't think this is a matter of testimony. I mean, people can decide to put songs out on singles or they cannot decide it. It depends.

Q Who makes the decision?

A I would say in Mr. Lennon's case it would be Mr. Lennon.

Q You have told us that you personally don't regard Angel Baby as a particularly attractive song, one that would lend itself to rerecording.

A Yes, that's correct, right.

Q Can you tell me why an artist like Maxine Brown, who is a rather well known artist, would have selected that particular song to rerecord?

A I certainly can't tell you because I didn't play a part in its selection for her.

Q Does it suggest to you that her taste as an artist might differ from your taste?

A Absolutely.

Q Now, can you tell me why an artist like John Lennon would select Angel Baby as a song that he would like to rerecord?

MR. BERGEN: Your Honor, there has been testimony by Mr. Lennon on that very issue. Mr. Lennon said it was one of his favorite songs.

THE COURT: This is cross examination.

A I have no idea why he would have selected it.

Q Does the fact that both Maxine Brosn and John Lennon selected this particular song to rerecord it indicate to you that the song may be more attractive than you thought it was?

A Not necessarily, no.

Q It's a matter of taste, right?

A Yes.

Q Do you know Mr. Norman Weisser?

A Yes.

Q Is he head of Chappele Music?

A Yes.

Q Do you regard him as an experienced publisher?

A I do.

Q If I were to tell you that Mr. Weisser has testified that when a song is rerecorded by a well known

artist this enhances the value of the copyright in the sense that it may lead to other cover records, would you agree or disagree with Mr. Weisser's testimony?

A I would have to disagree.

Q You would disagree?

A Yes.

THE COURT: Let me hear what he is disagreeing with again. Read the question, Mr. Reporter.

(Record read.)

THE WITNESS: Your Honor, I assumed in answering that question that he was talking about an artist recording it in an album.

THE COURT: He didn't actually say.

THE WITNESS: Well, I made that assumption.

Q I assume you know Mr. Murray Deutsch, the head of the New York Times Music Publishing Company?

A I do.

Q If I were to tell you that Mr. Deutsch gave the same testimony as Mr. Weisser, would you agree or disagree with his testimony?

A I would disagree with it.

Q Okay. Do you know Mr. Fred Beinstock?

A Yes.

Q Is he a well known music publisher?

A Yes.

Q If I were to tell you that Mr. Bienstock gave the same testimony as Mr. Weisser and Mr. Deutsch, would you agree or disagree?

A I would disagree.

Q Is it your contention, based in your own experience, that the fact that a popular artist rerecords a song, even assuming it's done as part of an album, has no bearing on what other artists may decide to do in the future with that same song?

A It depends on the song.

Q Does it depend --

A What I am saying is that if the song that's being recorded is a song which is in any event acceptable to other artists, then they may find it more acceptable to record because somebody else recorded it as a single.

Q Assuming that it's an acceptable song, does the fact that an artist of John Lennon's stature records it make it more attractive to other artists to record?

A It's possible.

Q You don't know?

A No.

Q Do you know whether when an artist like John Lennon comes out with an album of songs, whether other

artists sit down and listen to the album to determine whether there are any songs on it that they might like to record?

A I would say they might do so as to Mr. Lennon's original compositions, yes, because Mr. Lennon is known as a composer of note and as to new material which he writes, which is only on an album track, some other artist might find it attractive to record as a single, to capitalize on it.

Q Do you draw a distinction between Mr. Lennon writing his own compositions and Mr. Lennon recording somebody else's songs?

A Oh, absolutely.

(Continued on next page.)

Q What is the distinction?

A Well, you drew the distinction. I am drawing the distinction in response to your question. Your question was whether or not other artists pick up Mr. Lennon's album and look for the songs that he records.

Q But what is the consequence of the distinction?

A The consequence of the distinction is that another artist might be looking for an original piece composed by John Lennon. That is what most artists would look for.

Q Would an original piece composed by John Lennon be more valuable or more saleable?

A I would say it would, yes.

Q Do you know any of Mr. Lennon's own compositions that have resulted in substantial cover records?

A Yes.

Q Can you name a few?

MR. BERGEN: Your Honor, may I register an objection for the same reason I objected last week when the plaintiff sought to subpoena and take depositions with respect to some of Mr. Lennon's own compositions written with Mr. McCartney.

THE COURT: Let's hear this. I will overrule

the objection to this testimony.

THE WITNESS: Are you talking about compositions solely written by John Lennon or that he might have written with others?

Q Let's take compositions solely written by John Lennon first.

A I know of one that comes to mind.

Q Which one?

A Imagine.

Q Has Imagine resulted in a number of cover records?

A I would say that a number of other people have recorded it, yes. As to the exact number, I can't say.

Q Would you say in the case of Imagine, the value of the copyright was enhanced?

A I would say so, but Imagine was a single record.

Q It was also part of an album, was it not?

A I understand that, but its enhancement came mostly by the fact that it was on a single record and exposed to millions of people. It is possible that that composition on his album would have found recording by other people, but because it was an original composition by John Lennon and a very good song.

Q Can you name any other compositions by John

Lennon which resulted in cover records?

A Certainly those written with Mr. McCartney, yes. Yesterday, Michele.

Q Are you familiar with a songe entitled You Can't CAtch Me?

A No, not offhand.

Q If I were to tell you that You Can't Catch Me was rerecorded by john Lennon as part of the Rock and Roll albaum and then subsequently was rerecorded by Stephen Stills --

A Yes.

Q -- would you regard the Stephen Stills record as a cover record on John Lennon?

A It is a cover record by a definition of the cover records, yes. When it came as a result of John Lennon known as having recorded it is a question which I don't think anybody can answer.

Q But Don't Think You can't Catch Me is what you would consider an attractive rerecorded tune or not?

A No, I haven't heard it.

THE COURT: What were the two songs that Lennon wrote with McCartney that have been picked up?

THE WITNESS: Michele and Yesterday.

Q What were the other songs, I am sorry.

A The Judge asked me to repeat my prior testimony.

Q What was it, Michele and?

A Yes, sir.

Q Did these result in substantial cover records?

MR. BERGEN: He just answered that a couple of minutes ago.

Q I got distracted for a moment. Forgive me.

A Yes, I would say so.

Q And you would say this was by virtue of the fact that they were original compositions by Lennon and McCart ney?

A They were original compositions by the then Beatles, who were very much in vogue and who were attractive to many artists. Trendsetters in our business.

Q Co you consider Ya Ya an attractive song for rerecording in terms of your own definition of what constitutes attractive?

A I would say that there are probably many artists around who could and probably did do Ya Ya over the years.

Q Did you hear the recording of Ya Ya as it appeared on Walls and Bridges?

A I am sorry.

Q Did you hear the recording of Ya Ya as it

appeared in John Lennon's Walls and Bridges album?

A No, I did not.

Q Did you hear the recording of Ya Ya as it appeared in Rock and Roll?

A Yes.

Q Did you consider Lennon's recording of Ya Ya on Rock and Roll an adequate recording?

A As adequate as those that might have come before it, yes.

Q What does that mean?

A I don't think it was any better or any worse than any of the other recor ds of Ya Ya that I have heard.

THE COURT: You heard the one on Rock and Roll?

THE WITNESS: Yes.

THE COURT: But you didn't hear the one on Walls and Bridges?

THE WITNESS: Thatis correct.

Q Are you familiar with a song entitled Close To You?

A Yes.

Q Let me show you an exhibit which was furnished to us by Mr. Binestock, but let me ask you first do you consider Close to You an attractive song in terms of rerecording?

A Yes.

Q Would you say it would result in numerous cover records?

A Yes.

Q Did Mr. Bergen tell you about the exhibit concerning Close to You?

A About the exhibit?

Q That there was an exhibit in this case or that there had been testimony about Close to You?

A No.

Q Did he mention Close to You at all?

A No.

Q Now let me show you the exhibit that was furnished by Mr. Bienstock, Plaintiffs' Exhibit 451 and the purpose of the exhibit was to show that after the CArpenters had rerecorded Close to You, it was followed by very, very many cover records.

A I would say that.

Q Is it your contention that all of these oover records would have been based on a single only?

A J don't think I understand the question.

Q Do you know whether the Carpenters recorded it in an album or as a single?

A I think it was both.

Q Do you know whether these cover records were based on the Carpenter's album or on the Carpenter's single?

A I would say it was most heard by people based on the single.

Q But you don't know?

A I would say that that would be pretty accurate.

Q When you say most heard by people, what people do you mean? We are talking about artists now.

A Well, artists are certainly part of the general public and since artists want to record what they think is going to be commercial they listen to the radio to see what is acceptable to others and what is popular.

Q Let me ask you this: When John Lennon or the Carpenters or any other well known artist or group releases an album, in your experience would other artists sit down and listen to the actual album rather than waiting to hear it by chance on the radio as a single?

A Let me clarify it. I don't think that they are hearing it on the radio -- I don't they are waiting for that or that it occurs by chance. I think when a song like Close to You comes out as a single by the Carpenters, you can't miss hearing it. All you have to do is

turn on the radio. You are bombarded with it.

Q There was testimony by either or one of the gentlemen I mentioned before, Mr.Weiser, Mr. Bienstock or Mr. Deutch --

A Yes.

Q -- the effect that when John Lennon or any well known artist comes out with a new album it is the practice of many artists to immediately get that album and listen to it to see if it would lend itself to cover records.

Do you disagree with that testimony?

A I don't disagree, but I qualify it by telling you that I think that what such artists might be looking for would be Mr. Lennon's original material.

End 5B

Q How about an album by the CArpenters? Would they be looking for the Carpenters' original material.

A The Carpenters are not known as writers.

Q Do you know for a fact whether Close to You came out as an album first or as a single?

A I don't know. I do know that Close to You is a song that was in existence long before the CArpenters recorded it.

Q That is right.

A And did not have any success.

Q That is right. Did not have any success until the Carpenters recorded it, right?

A That is correct.

Q And after the Carpenters recorded it, there were numerous cover records as reflected on the exhibit I showed you, is that correct?

A That is correct, except I think there is a reason for that.

THE COURT: What?

Q What is the reason for it?

A Well, I think that Close to You was written by Bacharach, came out originally, I don't know how old it is, maybe six, seven or eight years before that period of time, in aperiod when Mr. Bacharach's writing was not

very popular in general. He had an atonal quality to the kind of songs that he wrote. I think when Close to You was finally released or came out by the Carpenters, Mr.Bacharach's writings were very much in vogue. There were several records written.

THE COURT: How do you spell Bacharach?

THE WITNESS: B-a-c-h-a-r-a-c-h, I think.

Q Are you familiar with a song called Oye Como Ja?

A Yes. It is a Spanish standard. I think it was recorded first by Tito Puente.

Q If I were to tell you that Oye Como Ja did not have any substantial earnings until an artist named Santaya recorded it, and then it started to generate very substantial earnings, would that be in line with your experience in the industry?

A I think Oye Como Ja is, as I say, a standard. I think it had probably many recordings. I think it always generated a certain amount of earnings over the period of time. I don't know how old is that song? I think that when Santaya, as a group came out, the kind of songs that Santaya did as a group which was a semi-Latin rock kind of composition, became popular in general. Other groups were doing it, and I think Oye Como Ja would have lent itself to that kind of interpretation, and therefore

the possibility of other cover records.

Q Tell me, is it the policy or practice in your industry to pay artists, particularly very well known artists, to record songs for you?

A No.

Q Did you license any Rock and Roll songs to John Lennon for inclusion in the Rock and Roll album?

A No.

Q WEre you asked to?

A No.

Q None of your songs were selected?

A No.

Q Despite the fact that you have the largest Rock and Roll catalog?

A Possibly not the same kind of Rock and Roll. The term "Rock and Roll" is very much all-inclusive. It refers to an era which spans a great number of years and I would think if you asked 20 different people whether a particular song is Rock and Roll, you would get 20 different opinions. I don't think that you can characterize an entire catalog with this kind of terminology.

Q I see. Do you ever in your business make projections of future sales based on past experience?

A Future sales?

Q Yes.

A We don't sell.

Q Future earnings?

A Future earnings, yes.

Q YOu do make such projections based on past experience?

A I would say so.

Q Is it possible to make projections of future earnings based on past experience?

A In my opinion, it is pure guesswork ,but we do it because as a matter of company policy we are required to do it.

Q For what purpose?

A For what purpose? I assume the corporation has a policy which it follows and all the division of the corporation no matter what their businesss are asked to make projections.

Q And what method do you follow in making such projections?

A It is a rather long and involved method, but I will give it to you.

Q Just in very brief terms explain the mechanics of making such a projection.

A Mehcanics of making such a projection in

the area of what kind of royalties, I think you will have to be more specific.

Q You tell me in what areas you make such projections.

A Well, basically in three areas. Mechanical royalties, performance royalties, and in printed music sales.

Q Let's take mechanical royalties first. How would you make a projection of future mechanical royalties?

A Characterizing as I did as pure guesswork, this is the way we go about it. We take what we earned in the previous year and we tack on 10 per cent and hope we do it.

Q How do you do it in the case of performance royalties?

A Basically the same way with the exception of the fact that performance royalties from one of the two performing rights socities is pretty much calculable on the basis of a three-year average of past earnings, so that there is no guesswork involved.

Q When you speak of the enhancement of the value of a copyright, are you referring to any particular number of years?

A I didn't speak --

Q You denied that the enhancement is possible, is

that right?

A I didn't deny it was possible, I denied that in this case, I didn't think it would be enhanced.

Q Well, if an enhancement is possible, over what period of years would you say the enhancement should be spread?

A Assuming no change in the musical tastes of the public, I would say a period of ten years.

Q Ten years? All right. Have you been compensated or have you been promised any compensation to testify today?

A No.

Q Do you have any connections with John Lennon or any company that he is associated with?

A None at all.

Q Do you have any connections with the Marshall, Bratter law firm?

A None at all. This is the first time I have dealt with them.

Q How did you happen to be called as a witness in this case, do you know?

A I have no idea.

Q Mr. Bergen just called you up and said I want

you to testify?

A Yes.

Q Did he tell you what the issue was in this case?

A He did.

MR. SCHURTMAN: I have no further questions.

MR. BERGEN: I just have one.

REDIRECT EXAMINATION

BY MR. BERGEN:

Q Mr. Robinson, when Mr.Schurtman was asking you whether you disagreed with Mr. Bienstock and Mr. Deutch and Mr. Weiser, can you tell us why you disagree with them on that point that he elicited from you?

A You have to get me back to the question which I gave that answer to.

Q It was the testimony that Mr. Schurtman alluded to by those gentlemen that when John Lenno- records a song, that immediately causes or causes other artists to go out and record that song.

A Well, I disagreed, because I think that as I had originally stated --

MR. SCHURTMAN: I didn't say immediately.

MR. BERGEN: I withdrew the "immediately."

A As I originally stated, I think that the song -- the value of the song has to be enhanceable. It has to be the kind of song first and foremost, that an artist would be willing to record. A broad-cased segment of the artistic community, and I don't think that simply having it recorded by John Lennon makes it a better song, or more acceptable.

End 6A

(continued on next page.)

THE COURT: Let me ask you this. We have had witnesses as you know, Mr. Weisser and all, called by Mr. Schurtman, that testified to this idea of the enhancement of the value, cover records and so forth.

And then you have testified as you have. I guess we start with just possibilities. It is certainly possible given the right song and the right circumstances, to have the copyright enhanced through cover records by the recording of a particular artist, right?

THE WITNESS: Yes.

THE COURT: Okay. Now what you are saying is, it depends on the circumstances, right?

THE WITNESS: And the song.

THE COURT: And the song.

THE WITNESS: Yes, your Honor.

THE COURT: You are saying that it is very important that if this is going to be done, that it be a single record, right?

THE WITNESS: Yes, sir.

THE COURT: And then the type of song, of course is very important, right?

THE WITNESS: Yes, sir.

THE COURT: And then, I guess you end up saying that one can never really know what is going to happen,

unless it happens.

THE WITNESS: Well, I don't know if that is exactly where I wound up except to say that if the song in question Angel Baby, had one, had been one which was recorded very often over the long period of time in which it was in existence, I would have to then term it as a song which was acceptable to a broad base of the artistic community, the people that recorded it often, albums, singles, what have you, but as a song that really did not have that acceptance.

THE COURT: In other words, it was originally a hit?

THE WITNESS: By virtue of its own original recording, the sound of that record, the area in which it was released made it then very acceptable to the public and they bought it.

THE COURT: What I want to get at is, is there any way, do you know enough to tell me this: The kind of thing that happened with "Close to You." Apparently it had been rocking along with very little earnings and then after the Carpenters did it, and they did put out a single and an album both, earnings went up to about 50,000 a year. That is the testimony. Prior to that time, it was 2,000 or less; something like that. Okay?

Is that a rare occurrence, that kind of thing or is there any way you can tell me how rare, how common?

THE WITNESS: Well, I think, your Honor, that each song is unique. I don't think one can take the circumstances which relate to one song and simply translate them to another and expect to get the same result.

Our business is a business of the right time, and the right place, and I think that as I have explained, that Close to You was probably always a good song. It had not been recorded by many people, because I think that it was one of a group of songs that Bachrach wrote that was also not recorded until Mr. Bachrach began to become popular as a composer.

And in that time period, they recorded everything he wrote and many of his songs --

THE COURT: The time period of the Carpenters?

THE WITNESS: Yes, yes. And in that time period, the songs had a certain sameness of quality about them, the cord structures, the instrumentation that was used. It was a trend. People were doing it.

And I think you add that to the circumstances, that is why you have a song which began to earn that kind of money as a result of the Carpenters' record. Single mostly.

THE COURT: So in other words, if you have one body of testimony here where people have come in with instances of cover records that caused a lot of -- I mean rerecordings which caused a lot of cover records -- you obviously know that there are such instances?

THE WITNESS: Absolutely, right. Close to You and so forth.

THE COURT: Then you come in with other instances where there are rerecordings and nothing happened, right?

THE WITNESS: Yes.

THE COURT: And both types of situations are in existence, right?

THE WITNESS: Correct.

THE COURT: If you took a particular song and wanted to know which category it fitted into, I guess you would determine that on the basis of the type of song, right?

THE WITNESS: Type of song and what has happened to it over its long history since its inception.

THE COURT: In other words, it might or might not fall into one or another category, right?

THE WITNESS: My opinion, yes.

THE COURT: Depending upon the song and its history?

THE WITNESS: Yes.

THE COURT: All right, anything else?

MR. BERGEN: No further questions, your Honor.

THE COURT: You may step down, thank you.

(Witness excused.)

THE COURT: All right. I wonder, I have to tell you that I need to take a little longer lunch today because of a commitment. I would like to adjourn at 12:15. Can we settle up our balance sheet on the other items.

MR. SCHURTMAN: Can I confer with Mr. Kanzer for two minutes.

THE COURT: Yes.

(Recess.)

MR. SCHURTMAN: Your Honor, I have a summary report from Mr. Kanzer concerning the figures we discussed in the meeting next door, and as I understand it, the major discrepancies in the Canadian figures for Bock and Roll is that while 65,000 units were reported to the court, Capitol has in fact set up a reserve of 11,000 units for potential returns and so that the publisher's royalty statements are based on a reserve. That is my brief understanding of what is going on.

Now, at this point, I repeat to your Honor that unless I can get some orderly discovery on the question of

reserve and returns and the interrelationship, I find it difficult to proceed.

I therefore respectfully renew my motion to be permitted to conduct discovery on that point.

THE COURT: Let me say that even with my infantile understanding of licensing songs, I was somewhat familiar with the term reserve. I couldn't describe to you now you know, how it is done and how it is recorded and all of that, but anybody knows that the subject exists. Surely Mr. Levy is intimately familiar with the subject of reserve.

Now, we have had for weeks before us these figures about sales. We have referred to them, used them over and over again. There was an exhibit which you referred to, I forget whether it is No. 101 or 110 but it had --

MR. SCHURTMAN: That was U.S. not Canadian, but I am talking about the subject. In other words, if, I expect, I would have expected counsel a long time ago to bring out any problems with respect to tne metnod of reciting in this trial sales figures.

If it is proper to include reserves as of a certain date, it should be done across the board. If reserves are not to be included, that omission should be

across the board. The whole subject of how to properly calculate sales figures for the purpose of this trial is a very old subject and I assume and have assumed that counsel have basically agreed that these figures can be used.

Now, to reopen -- it is not a reopening, it is an opening as far as I am concerned of a subject which should have been dealt with long ago and has never been.

MR. SCHURTMAN: Your Honor, let me point out --

THE COURT: I think that there must be a way that the sales figures were given to me before. Did they or did they not have reserves?

MR. PRETTYMAN: Your Honor --

THE COURT: The 342, 425.

MR. PRETTYMAN: I can tell you this. All of the figures that were given to you were given to you in exactly tne same fashion. Now, we got back here in this room and Mr. Klein had certain figures which were different than ours. We sat down, we explained the difficulties out. I thought we had reached an agreement on this thing. There wasn't any problem. You want Mr. Posner to explain to you what the reserve --

(Continued on next page.)

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MR. PRETTYMAN: Mr. Posner, tell the Judge what we did in regard to reserve on these figures.

THE COURT: Do you know this? We have some very famous figures which were used for weeks and weeks.

For instance, the 425,000 sales figure on Walls and Bridges, and that was through a certain date.

MR. PRETTYMAN: February 29th.

THE COURT: Does that or does that not represent a figure net after reserves?

MR. PRETTYMAN: It is my understanding that that is a net sales figure.

THE COURT: But is it after reserves?

MR. PRETTYMAN: I don't want to state it unequivocally.

THE COURT: Mr. Posner, do you know?

MR. POSNER: Yes. The sales numbers that we have you are sales numbers -- there are no reserves.

THE COURT: Wait a minute.

You say no reserves?

MR. POSNER: There are no reserves in those numbers. Thos were actual units sold.

THE COURT: In other words, as returns come in -- in other words, if we were taking the figure at a later date, some later date, there might be returns --

MR. POSNER: Or sales.

THE COURT: -- or sales.

Well, that has been my understanding all the way through.

MR. SCHURTMAN: That's on U.S. sales.

Now, on Canadian sales --

THE COURT: Does the 65,000 include reserves?

MR. POSNER: Absolutely not. It's the same number.

The only time reserves went into play, your Honor, is if you are a publisher you are getting a statement.

THE COURT: Okay. I am talking about what my understanding has been, that the figures we have been dealing with were net sales figures as of a given date, taking into account units shipped out to the customers, less units actually returned as of that date.

I think that's what Mr. Prettyman and Mr. Posner have just told me, and I think that's abundantly demonstrated in the evidence.

Now they say that that is the way the 65,000 Canadian figure for Rock and Roll was calculated.

Are you saying that, Mr. Posner?

MR. POSNER: Yes, sir.

3 rgmch

THE COURT: Do you have any different information, Mr. Schurtman?

MR. SCHURTMAN: My information as to the Walls and Bridges, the reserve --

THE COURT: I am asking you about Rock and Roll, 65,000.

MR. SCHURTMAN: Yes.

My information is that there is an 11,000 reserve while there is no reserve on Walls and Bridges.

THE COURT: You mean the 65,000 you are saying should be reduced by a reserve?

MR. SCHURTMAN: Yes, in order to make it com arable to Walls and Bridges, because those were the percentages you were using.

THE COURT: What's the figure on Walls and Bridges we have been talking about?

MR. SCHURTMAN: Walls and Bridges is 48,800 in Canada.

THE COURT: Appearing in what exhibit?

MR. SCHURTMAN: Appearing in Exhibit DG.

THE COURT: What Mr. Schurtman is saying --

MR. PRETTYMAN: Yes, but it just isn't the fact. There is no difference between the treatment of the two.

THE COURT: Have you explained all this to

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Mr. Schurtman?

MR. PRETTYMAN: I thought we had.

THE COURT: Or Mr. Kanzer, you were the expert in the room.

What about that?

MR. KANZER: We did not discuss the relationship of reserves in terms of the actual numbers on Walls and Bridges, because Mr. Prettyman's letter had already explained there were very few reserves left on Walls and Bridges.

Is that correct, Mr. Prettyman?

MR. PRETTYMAN: Yes.

MR. KANZER: 87 units.

THE COURT: I don't have the exhibit, but apparently for purposes of calculating this market share business, a figure of 48.8 thousand was used for Canadian sales; right?

MR. POSNER: Yes.

THE COURT: Did that or did that figure not include reserves?

MR. POSNER: It has nothing to do with reserves. It's not included. All numbers are simply sales.

MR. PRETTYMAN: Does that apply also to Walls and Bridges?

MR. POSNER: Every album.

THE COURT: You are saying to me that the 48.8 thousand figure and the 65,000 figure are calculated on the same basis?

MR. POSNER: Yes, net sales.

THE COURT: Do you have any information contrary to that, Mr. Kanzer?

MR. KANZER: The facts statement is correct.

The implication, however, is very important.

THE COURT: What do you mean, the fact statement is correct?

MR. KANZER: I am not questioning his statement as to how that calculation was made. Both the 48.8 and the 65 do not include a reserve in the form of a subtraction.

What we are saying is the 65 should be reduced by the amount of the reserve because that album is still being sold and is still subject to considerable reserves.

Capital has figured out, as Mr. Prettyman's letter shows, that Walls and Bridges has reached the point where there will not be an appreciable number of returns, so their number is in effect the same number whether or not we were to consider reserves for Walls and Bridges, whereas this number of 65 is in effect overstated by perhaps as much as 11,000 units.

THE COURT: My friend, this is something that

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we could have figured out and brought up at the time of the trial --

MR. KANZER: We didn't have the knowledge.

THE COURT: I'll tell you, I don't know how many times we talked about what I will call the generic subject, that is, over and over and over again it was brought out that as time went on reserves came in. In fact, Capital itself put forward the evidence that the returns will increase during this 12 or 18-month period after release and be far more than at the time of the release, which is common sense, so if there is to be an adjustment, and I specifically asked about whether there should be any adjustment on the 342,000 figure for Rock and Roll sales, because I knew, as everybody else in this room knew, that there might be further returns.

I am sure there are returns going on now.

Well, nobody suggested an adjustment. Capital argued, well, it should be adjusted downward.

MR. PRETTYMAN: That's exactly right.

THE COURT: They didn't make that suggestion and naturally the plaintiffs didn't make that suggestion because it would have increased their damage figure potentially, but I am pointing out that this type of problem, the adjustment or prediction of returns, has been with

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us a long time and if it -- we all knew when Rock and Roll was released. We all knew that it came some five or six, whatever the number of months is, after Walls and Bridges.

I mean, we have known this and it has been gone over and over again. Now, if the figures aren't comparable, I am sorry, but I think we have got to start adjusting a lot more.

You know, maybe we could start looking into the current figures for Rock and Roll and see how many returns have gone on since that 342,000 figure, which I am sure is obsolete by now, but this is simply a lawsuit here. We just try lawsuits; we don't write histories.

So I don't see any good reason why, if there should have been an adjustment of the 65,000 figure,you didn't come forward with that suggestion immediately. Apparently it didn't suit you for the 342, but it now suits you for the 65.

MR. SCHURTMAN: Your Honor, I disagree with that last statement, but may I respectfully ask that my letter to you dated April 22nd, which was intended to be a motion and stated that it was intended to be a motion for discovery, that we mark it for identification, and that it be made part of the record, and I will at this time orally renew my motion for discovery, based on the fact

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that the evidence that has already been submitted to you has shown that there are some very substantial errors in Capitol's records, and at this point I am not prepared to accept Capitol's computer printouts at face value.

(Continued on next page)

THE COURT: The thing is your statement is belied by your associate because he does not say that there are errors. He has told me that he concedes that as a matter of fact the Walls and Bridges $300,000 figure is computed on precisely the same basis as the Rock and Roll 65,000 figure.

He simply asserts that there should be an adjustment to the 65,000 figure to take into account what we have known for I don't know how long, that Rock and Roll came out several months after Walls and Bridges.

Now, this is a point -- that is the only point which he is making or has made in the last few minutes.

Right, Mr. Kanzer?

MR. KANZER: I don't question that the fact --

THE COURT: Am I right in summarizing what you are telling me?

MR. KANZER: Yes.

THE COURT: Because I don't want to have some open-ended situation and get another letter with another argument two weeks from now.

MR. KANZER: You accurately represented what I said.

THE COURT: So the only issue before us is whether -- first of all, you dispute the accuracy of the

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65,000 in the way that you went into the other day and I have ruled on that.

Secondly, you believe 5000 should be subject to a reserve, right? Those are your two points?

MR. SCHURTMAN: No. My third point is that ever since the defendant started presenting their proof of damages, I have been asking you for permission to conduct discovery with respect to figures that were never made available to us before and where Mr. Prettyman himself told your Honor --

THE COURT: Look, Mr. Schurtman, I have tried all morning to get it specified. What are the figures you want to attack?

MR. SCHURTMAN: I want to check all of their figures. I don't believe their computer printouts.

MR. PRETTYMAN: They just did, your Honor.

THE COURT: You literally mean all the figures?

MR. SCHURTMAN: No, I am talking about the Canadian figures. We have already --

THE COURT: What Canadian figures do you want to check?

MR. SCHURTMAN: I want to check the Canadian figures on Rock and Roll, the sales of Rock and Roll, the

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reserves for Rock and Roll, the returns on Rock and Roll and I want to do the same thing with Walls and Bridges.

THE COURT: So you have two albums you want to check.

MR. SCHURTMAN: Right.

THE COURT: I understood that these gentlemen --

MR. PRETTY MAN: We just did that.

THE COURT: -- just spent about an hour and a half with Mr. Kanzer and to have you just announce that there is some vague need for discovery , I don't know what you are talking about.

MR. SCHURTMAN: All they have shown Mr. Kanzer are their own particular statements and what Mr. Posner told him. That is what I would like to get behind. Why do we have to keep accepting their figures at face value? You gave Mr. Bergen the right to come in and audit our books because he didn't want to accept our figures at face value.

MR. BERGEN: We didn't do any such audit, your Honor.

THE COURT: Mr. Kanzer, I am going to address you. I don't think Mr. Schurtman knows what went on in that room, so I want to ask you: What defects do you believe you found in the Rock and Roll and Walls and

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Bridges, and I want to know it square and I want to know it right now.

MR. KANZER: Your Honor, what we did was we compared the figures supplied to Alan Klein with the figures that Capitol has supplied to the Court.

THE COURT: As I understand it, the genesis, one of the reasons why we are here today arguing about this is that you believe there was some discrepancy shown by the Alan Klein figures, is that right?

MR. KANZER: That is correct, your Honor.

THE COURT: Do you have any other basis for alleging an alleged discrepancy?

MR. KANZER: The only basis would be past experience with Capitol's figures has proved that there have been mistakes made.

THE COURT: Let's not be vague. You mean what we talked about the other day?

MR. KANZER: Two specifics, your Honor. During a deposition of Mr. Levy, he was asked a question as to what he thought the sales of Rock and Roll were. He said he thought they were probably in the ball park of 400,000. He was then asked, well, isn't that completely inconsistent with the royalty statements which Capitol has furnished

you and Mr. Levy said yes.

In fact, I received one today and it is a fraudulent statement. Approximately a day or two later, your Honor, Capitol suddenly sent a new check with a new statemen t-

THE COURT: Doesn't this refer to the 65,000?

MR. KANZER: No. That refers to U.S. royalties. In other words, you asked where we have had past experiences. This was on June 5th of last year, your Honor, that that deposition took place and within a couple of days thereafter Capitol, in effect, conceded that it had made a massive mistake in terms of its calculations.

The second time was on this.

THE COURT: You are talking about something that came to light last June?

MR. KANZER: You are asking us for the basis of --

THE COURT: To some deposition last June.

MR. KANZER: Two things, your Honor.

THE COURT: So you have had that suspicion beginning last June, right?

MR.KANZER: And now we again had this experience on the 65,000, that Capitol suddenly discovered that while it was reporting 29,000 to Mr. Levy as the total number of

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units that had been pressed, in fact it was off by some 60,000 units.

THE COURT: We have been through that.

MR. KANZER: Again as Mr. Schurtman already argued this morning, your Honor, it may be that that explanation does in fact take care of the particular facts involved, but what it does not explain is how Capitol could have records that were so inaccurate for such a sustained period of time without apple finding them.

THE COURT: Aside from that general talk, what specific errors, if any, do you now believe exist?

MR. KANZER: We do not know,your Honor. All we can say is we now understand what the differences are between the figures supplied to Mr. Klein and the figures supplied to the Court and we do not question that the two can be explained.

THE COURT: Through the reserves.

MR. KANZER: No, not through reserves. The differences -- well, as to Canadian sales the differences reflected at a different cutoff date. As to the United States sales, there are also differences there. That appears to be explainable in terms of a category known as export sales.

THE COURT: Is there anything about which you

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specifically have dealt with this morning that you want to raise as errors in Capitol's presentation? Aside from the reserve, is there anything specifically you want to raise?

MR. KANZER: At this point we have no knowledge of any specific factual mistake. All we can say -- except the ones Mr. Schurtman has already pointed out.

THE COURT: Namely the problem about the 65,000 which we went into before and the claim that the 65,000 should be reduced by a reserve, right?

MR. KANZER: That is correct, your Honor.

THE COURT: Otherwise, it is this general suspicion which causes you to want to get into discovery, is that right?

MR. KANZER: Yes. Otherwise we are simply comparing one set of Capitol's figures with another set of Capitol's figures without looking at the underlying documents.

MR. PRETTYMAN: I want to point out that they submitted these figures from Mr. Klein in order to demonstrate that our figures were wrong and when we sat back there and subtracted the figures, they came out precisely. They came out right on the button.

THE COURT: Okay, the motion for discovery is

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denied. The record is closed. You can have your letter marked for identification.

MR. SCHURTMAN: Thank you.

THE COURT: Mr. Prettyman -- I don't know what good the letter will be marked for identification --

MR. SCHURTMAN: It sets forth the basis of my motion.

THE COURT: Have you got your counter letter?

MR. PRETTYMAN: I don't have it in front of me, but I will get a copy.

THE COURT: YOu get that in the record --

MR. SCHURTMAN: Do you want to mark mine and deem Mr. Prettyman's?

THE COURT: We will adjourn until 2:00 P.M. I think this absolutely finishes Capitol. We are finished with the counter claims and now the only thing is to finish up the proof on Mr. --

MR. PRETTYMAN: What I mean is I am excused?

THE COURT: Yes.

(Luncheon recess.)

THE CLERK: Plaintiff's Exhibit 380 was marked for identification, as well as Exhibit EJ.

THE COURT: What is that apparatus?

MR. BERGEN: That is a machine to play a tape, your Honor. Going to be very brief.

THE COURT: How is one going to know whether this is a song indeed which would have done well in cover records or not? Did you ever ask any of your witnesses particularly with reference to this song? They stated in very general terms, they were very, very positive and categorical and I don't think there was any serious weakening on cross.

But this witness has stated something alittle different and that is that looking at this sing it is his judgment that this song was not one that would be picked up.

MR. SCHURTMAN: Apparently at least two artists have renown, Mr. Lennon and the other artist whose name I don't instantly recall, apparently disagreed with this witness and felt it was a good song, that they liked to record, that they would like to release to the public, and I think that has a great deal more weight than what this man said.

THE COURT: You don't need any --

MR. SCHUTMAN: I don't think so, your Honor, because in the first place it was not necessarily his song, it was a song.

In the second place, we have again the classic instance of a wrongdoer saying well, even though I didn't do what I was supposed to do, we don't know what would have happened if I had done it. It is the reverse situation.

THE COURT: I am conscious of that. I am conscious of that argument.

MR. SCHURTMAN: I don't know how we establish that a particular song would have done something in the future. All we can go by is the fact that at least two reputable artists thought it was a very good song.

THE COURT: I am just asking you as a matter -- we didn't get into the ultimate argument because I want to hear about this -- but I was just trying to think momentarily if there was any evidence on your side, any expert opinion that was specifically directed to an appraisal of this song.

MR. SCHURTMAN: The song Angel Baby, I don't.

THE COURT: And I guess there really wasn't.

MR. SCHURTMAN: I did not put any ine.

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THE COURT: Who are we going to have as the next witness.

MR. BERGEN: On that point, I would just like to point out that the two records Mr.Schurtman is talking about are over a span of 15 years from the time the original song was recorded in 1960.

Now they could have the greatest artists in the world, but that doesn't show any great rush to record tha tsong. There are only four in the 15 years, and two of them he claims --

MR. SCHURTMAN: One of them is Mr. Lennon. He says I claim.

THE COURT: Do you have a witness?

MR. SCHURTMAN: We are supposed to cross-examine Mr.Strauss.

MR. BERGEN: I haven't finished with Mr. Strauss. Is Mr. Strauss going to sit in that chair?

MR. BERGEN: Mr.Strauss is out making a telephone call. He will be right in. We asked for production of certain documents. One of them was a sheet that Mr. Mr. Zucker pulled out at our last session with respect to the history of the earnings of Ya Ya. We asked in a letter a week ago today for production of that. We also

asked for the data with respect to Oye Como Ja and all of that information.

THE COURT: You meean the breakdown?

MR. SCHURTMAN: We have it here pursuant to your direction.

THE COURT: Can we go ahead and introduce those materials?

MR. SCHURTMAN: If Mr. Bergen wants to offer them, I will object on the grounds of relevancy.

MR. BERGEN: I would like to see them first before I do anything.

THE COURT: Look, just to make time, let us give -- that is something that should be produced now. You are not going to offer them, but you need to produce them. If Mr. Bergen wants to offer them, he should be able to look at them now.

MR. SCHURTMAN: In the meantime, your Honor, I was just checking with your law clerk as to whether you received a brief you have requested on Phase 2 of the settlement agreement.

THE OOURT: I think I have. What are you talking about?

MR. SCHURTMAN: We sent it in late Friday, dated April 23.

THE COURT: Right, of course.

MR. SCHURTMAN: That is on the enforceability of the second part of the agreement.

THE COURT: Right. Okay.

MR. BERGEN: Your Honor, may I just get Mr. Strauss.

THE COURT: Yes, please.

(Pause.)

T HE COURT: All right. Now who is examining Mr. Strauss?

MR. BERGEN: I was examining Mr. Strauss, your Honor.

MR. BERGEN: Your Honor, in a memorandum of law that we filed on Friday, I said that we would put in a new schedule, and I don't know whether I should substitute this for the prior one I put in which was exhibit --

MR. SCHURTMAN: Your Honor, we haven't been served with any brief.

MR. BERGEN: It was sent to you by mail Friday.

MR. SCHURTMAN: By mail?

MR. BERGEN: Yes.

MR. SCHURTMAN: We have always served you by hand.

MR. BERGEN: You haven't served us by hand with

anything. It was always by mail.

THE COURT: What is it called?

MR. BERGEN: It is called a memorandum of law in John Lennon in opposition to this claim.

THE COURT: I have it.

MR. BERGEN: And I said in there that I was going to substitute a new schedule, and I would like to substitute this for DX. DX was the one that Mr. Strauss went through. And he has done --

THE COURT: Sure that would be helpful.

MR. BERGEN: He has done another computation. A copy for your Honor.

THE COURT: Does that comport with the testimony that we had, or is this a new --

MR. BERGEN: This is a schedule where I have tried to again explain and Mr. Strauss will try to explain how he comes out with a calculation of the damages if we can just affix that.

THE COURT: Defendants' Exhibit D what?

MR. BERGEN: DX.

MR. SCHURTMAN: Your Honor, I object to the substitut ion. I would like the original DX to stay in the record.

THE COURT: We will call it DX-1.

MR. BERGEN: That is fine.

THE COURT: So we have a DX and a DX-1.

MR. BERGEN: That is right.

THE COURT: I will receive it.

MR. SCHURTMAN: I object to the exhibit too, aside from the substitution.

THE COURT: Well, I will take it as a revision created on the same --

MR. BERGEN: That is correct.

L E O S T R A U S S resumed.

DIRECT EXAMINATION (continued)

BY MR. BERGEN:

Q Can you explain DX-1 please?

A Yes, I tried to recast the figures that were in my original schedule to make it more logical and clearer to the Court, and I put a preamble so to speak on it explaining my concept of what I was trying to do and that was to calculate any damages that may accrue to Big Seven caused by the alleged breach of contract under the so-called "come together" settlement agreement which in the United States would be based on two cents for each three songs for each record sold, less the amount it would have received

from Lennon's actual performances, but for the acts of Levy and Adam VIII. And then the first calculation is the Walls and Bridges earnings domestic --

THE COURT: I think if we are going to go into this again I have to get a context. What was the exhibit, we are comparing the plaint iffs' exhibit, this was being compared to --

MR. BERGEN: 301.

THE COURT: Can we get that?

Where do we go?

A As I was saving, based on the data that was offered in this court, domestic sales of Walls and Bridges were 425,000 units and for the three songs that would result in a six cent royalty rate for $25,500. The foreign royalties according to Exhibit 302 was 19,893 totaling $45,393.

Then the amounts that would have been received but for the acts of Levy and Adam VIII is in sub-part (b) of the exhibit. Actually received for one song on Walls and Bridges, two cents, times the actualy 425,000 units or $8,500, and there were two songs Ya Ya and You Can't Catch Me on the Rock and Roll record which would have sold but for the acts of Levy and Adam VIII, 425,000 units at four cents, is $17,680.

The foreign royalties on Rock and Roll, which is also I believe Exhibit 302 although I did not note it here, is $16,872 or a total of $43,052.

THE COURT: Can I see the original DX?

Why are you putting in as a deduction -- royalty rate based on 442,000 records of Rock and Roll?

THE WITNESS: Are you questioning the quantity, your Honor?

MR. BERGEN: Because your honor, the same argument we made --

THE COURT: I rejected the last time.

We spent endless time on that. Take this back. I mean, your lawyer can make any argument you want to, but I am not -- I don't want a bunch of calculations that I told you last time I would reject.

MR. BERGEN: Your Honor, I was trying to present it again in a different form to try to convince you that it is proper because if it had been not for Mr. Levy and Adam VIII acts, Rock and Roll would have sold 442,000 units, and Mr. Levy would have earned more royalties.

I am just trying to -- our position is that we should get some kind of a credit for that.

MR. SCHURTMAN: The same argument that was made.

MR. BERGEN: I know it is the same argument.

THE COURT: Things that I cannot understand I am not going to do anything about. We went through this.

Now please revise the exhibit and take it out. So we don't waste time.

MR. BERGEN: There is no need of revising the exhibit. We can just leave Exhibit DX, but I had a section in the memorandum on this which I tried to explain.

1A (continued on next page.)

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1b

THE COURT: I will not accept it. Let's go somewhere.

I am not going to have deductions on that basis, period, and use the 325,000 or whatever it is; 342.

THE WITNESS: If you substitute 342,000 units for 442,000, I think you will arrive at the same result on this revised schedule as you did on the original, give or take a few dollars for breakage.

THE COURT: All right.

THE WITNESS: I did this this way first, based upon my understanding of Mr. Bergen's explanation that he had submitted a memorandum to you, and also perhaps that this would be clearer to you than the original schedule which was done somewhat in haste, to which you ~~took~~ some exception.

THE COURT: Well, were there other --

THE WITNESS: There were no other changes from my original figure there, I don't believe. I don't have the exhibit.

But if you reduce the 442,000 units to 342,000 units, you would reduce my Subsection (b) in this new exhibit by $4,000 and that $4,000 difference would carry forward, less the writer's share would be $2,000, so that my net figure on the bottom, marked Recap, which now shows

$270, which showed $2,270, as opposed to the original exhibited $2,200.

THE COURT: All right. Anyway I got the positions and I will think about all that.

This is on just mechanical royalties?

THE WITNESS: Yes, sir.

THE COURT: Okay. Fine. Thanks a lot.

MR. BERGEN: May I have this marked as our next exhibit?

(Defendant's Exhibit EX marked for identification.)

THE COURT: Just for another minute, what is the exhibit of the plaintiff that gives the complete total alleged loss of mechanical royalties, including foreign and everything?

Just to refresh my memory, what is the main difference between your treatment and Exhibit 302?

THE WITNESS: If I may see a copy of 302 --

THE COURT: I understand that 4,000, that I am clear on. I understand that difference, but there is a lot more difference.

THE WITNESS: Yes, on the domestic figure, I reduced the $10,160 on Exhibit 302 by the fact that they did not consider that there was a second song on Rock and

Roll. They had only, in deriving that figure --

THE COURT: That's right. I remember.

THE WITNESS: That reduced that to something like $3,300, less a Harry Fox commission, roughly.

And similarly, they didn't get credit for the foreign royalties on that same song.

Those were the two prime sources, and then there were some minor adjustments for foreign publishers and collecting agency fees, et cetera.

THE COURT: The main difference would be what you say is the failure to take into account the recording of Ya Ya on Rock and Roll?

THE WITNESS: That's correct.

THE COURT: Can you say how much difference that makes, roughly?

THE WITNESS: Yes. It would reduce their calculation of $30,053 by $23,700, roughly.

THE COURT: So it is a reduction of --

THE WITNESS: Reduces it to -- I need a pencil.

MR. BERGEN: Here.

THE COURT: $30,053 is reduced by what number again?

THE WITNESS: Approximately $23,700, which gives you a difference of $6,300, I would daresay.

Approximately $7,300 before any minor adjustment.

THE COURT: $6,300?

THE WITNESS: $6,300. I stand corrected.

$6,300 before minor adjustment and before the writer's sahre which I have also considered in my two schedules. The writer would be entitled to 50 percent.

THE COURT: All right. Go ahead, Mr. Bergen.

MR. BERGEN: Now, your Honor, the last time we were together, Mr. Strauss was starting to -- we had some schedules and you asked us to revise the schedules or make them more legible, and we have done that, I hope. And that is Defendants' Exhibit DK, which consists of three pages, a schedule for Ya Ya, You Can't Catch Me, and [redacted] Baby.

I'm sorry. That's EK.

And I offer those schedules in evidence.

MR. SCHURTMAN: Which schedules?

Your Honor, I haven't had a chance to check them out. Mr. Bergen refused to show them to us in advance.

I object.

MR. BERGEN: You wouldn't give us the stuff in advance, either.

MR. SCHURTMAN: We simply have no way of checking

them at this point.

THE COURT: How many months will I wait until we can have the privilege of receiving these in?

I don't understand why it wasn't given to you.

MR. SCHURTMAN: I don't, either.

THE COURT: But I can't turn the clock back. I will receive them, and if you have a real problem, I will help you out.

MR. SCHURTMAN: Why don't you let the witness first at least explain what these are supposed to be?

THE COURT: Wasn't that basically explained the last time?

MR. BERGEN: The other two weren't -- we only had one of them that was even in reasonably legible form and if he could just go through them quickly and explain them --

THE WITNESS: Yes. I analyzed the three songs that I understood were in question here. One was Ya Ya, You Can't Catch Me and Angel Baby, and I admit originally I concentrated on the last five years, and practically as an afterthought I went back and reviewed their books and records for prior periods, but did not extract as much detailed information from the books as I did for the later period.

Looking at Ya Ya, I analyzed the mechanical royalties for each six-month period, which is the way they maintain their books, in order to determine writer's royalty, and I extracted the total royalties for each six-month period for the period that the information was available to me, and that is the first numerical column on the left.

And in between the date, the six-month period ending and that, I interlineated some of the more important licenses, dates of the important licenses and to whom they were issued.

Then, from that point on, I spread across some of the more substantial earnings and the courses of thse earnings and the amounts.

And this schedule purports to be an analysis or is an analysis of those figures. I had not analyzed the figures up to June 30, 1971 by record company or by artist.

Subsequent thereto, I was able to do that and I did do it.

Then the last column is just for comparison purposes, to see what happened with performances when a particular large artist recorded a song, to see if there was any substantial jump in activity. And that figure came from

data that the Big Seven supplied to me.

All I did was regroup the figure for each six-month period and insert it. And if one looks at this schedule, one can see that there is no substantial jump except perhaps if you look at the period between December '70 and June '71, the Lee Michaels' recording. There was a spurt to some degree in the performances.

But there is, as far as I could see, looking at this, I could find no cause and effect relationship between the performances and any big artist recording the song. And in fact when John Lennon recorded it in February of '75 the performances didn't go up at all.

THE COURT: What are all the columns that you have? Things like Roulette Release, all those columns across the page.

THE WITNESS: Specific earnings from that source.

For example, the first column is the Lennon recording, should be recordings, for the two records. Those are the earnings that were posted to this book for these six-month periods for the Walls and Bridges and the Rock and Roll combined. And it earned for the three six-month periods $16,739.

THE COURT: I see.

THE WITNESS: And then MCA is the name of a record company. They re-released a Lee Dorsey version of a record sometime in the last part of '73, and that column sets forth the earnings or royalties, royalty accountings they rendered on behalf of Ya Ya that was posted to this book.

And Roulette re-released, the next column over, Roulette re-released a Dorsey version or several versions from time to time and those are the earnings that were posted.

And then other labels re-released the Lee Dorsey, and I just put those in, those companies. K-Tel, the Longines Symphonette, are the type of companies that put out packages of records and would usually take out records and put them out. And so would CBS in this case. That would be the CBS Special Projects Department.

And then the next column was the Lee Michaels' version that released on A & M in Canada, A & M Limited. These are the earnings that were reported from that company or from those companies.

THE COURT: There is a September 1975 Frankie Gee; you don't have any column about him.

THE WITNESS: No. There was insignificant royalties reported. This is only the major figures, your

Honor, obviously.

Q Can you describe what this word "audit" in column 6 under Lee Michaels A & M refers to?

A Yes. Well, the Harry Fox Agency auditors audited A & M, and as a result of the audit, found that A & M had failed to report royalties of $444 on Ya Ya and it was received by the Harry Fox Agency and paid out in the period ending December 1973, but really was not earned in that period. It was earned in an earlier period.

(Continued on next page)

Q Can you describe the next page briefly if you can with respect to You Can't Catch Me?

A Yes. I attempted to do essentially the same --

MR. SCHURTMAN: Your Honor, could I have a clarification on this one before we leave it?

THE COURT: Yes.

MR. SCHURTMAN: I am having trouble relating the first column and the second column. Perhaps I am just missing something, but if you look at line 23, what is the relation between the 33,700 and the 14,519? Is that part of it?

THE WITNESS: Yes. The first column is the total column and the other columns are an analysis of the major sources of revenue. Not all sources, but the major sources and you see I have a last column, column 10 is marked balance. That is just on the total and that is just to foot it across. It represents all other earnings in all other companies.

MR. SCHURTMAN: In other words, during the six months ending June of '75 approximately $20,000 of earnings came from sources other than Lennon?

THE WITNESS: Yes. Approximately 19,000. That's correct.

MR. SCHURTMAN: All right.

THE WITNESS: Of which I have analyzed about 17,000 in the other columns for that same period.

A I take the same things essentially on You Can't Catch Me and apparently the song was assigned to Big Seven on February 5, 1969, although they had information for periods prior to that date, so I did whatever information was available. Since I was aware that the Rolling Stones and the Blues Project had recorded that song for prior periods, on this song I did do some analysis prior to the last five years and I did determine the figures for the Rolling Stones and the Blues Project, as well as the Lennon recording on the Rock and Roll album.

So the first money column is the total mechanical, the next three are the large earnings for the different recordings and then the next column is a balancing column and then also the domestic performance which came from their work sheet.

I would also like to point out on all of these schedules, although it's marked on You can't Catch Me domestic mechanical only, the details on all the songs are domestic mechanicals because the foreign mechanicals which are included in the total column did not have the details as to which record company and therefore which artist it came from, so there was no way of analyzing from

this source the foreign royalty by artist.

Then on Angel Baby, the third song, I analyzed the mechanical royalties and the performance and there was no substantial earnings in any period, but I did notice that the bulk of the mechanicals in every period came from a record company called Ridge Sound Recordings, so I just made a note of that and that is essentially those three schedules.

MR. BERGEN: Your Honor, I will have some additional questions I would like to ask Mr. Strauss, but if we could go ahead with the cross examination and then he can have an opportunity after that is finished to look at these rather voluminous schedules that I was just handed by Mr. Kanzer with respect to Oye Como Va, Maybe, Danny's Home, My Boy Lollipop and You Can't Catch Me, Ya Ya and Angel Baby. We just haven't had an opportunity to review them.

MR. SCHURTMAN: What are we doing with these last exhibits?

THE COURT: He is offering EK. Any objection?

MR. SCHURTMAN: Subject to checking the accuracy of Mr. Strauss' figures, no objection.

THE COURT: All right, received.

(Defendant's Exhibit EK received in evidence.)

XXX

MR. BERGEN: No further questions,

XXX

CROSS EXAMINATION

BY MR. SCHURTMAN:

Q Mr. Strauss, who retained you to appear as an expert witness in this matter?

A Mr. Dolgenos.

Q Do you know on behalf of what party you were retained?

A John Lennon.

Q What is your compensation arrangement?

A I am being paid on a time basis strictly.

Q Both for the audit you conducted at Big Seven and for the testimony you are giving?

A That's right.

MR. BERGEN: Objection. There wasn't any audit at Big Seven. Mr. Strauss reviewed --

MR. SCHURTMAN: Let me clarify that.

Q Mr. Strauss, did you go to the offices of Big Seven?

A Yes, I did.

Q Did you examine books and records at Big Seven on which you based your exhibits?

A Yes, I did.

Q How much time did you spend at Big Seven examining

their books and records?

A Oh, I would say a good part of a day.

Q Were you shown everything you asked for?

A There might have been one or two things that I wasn't shown or didn't pursue.

Q But basically anything you asked for was given to you, right?

A Yes.

Q What is your hourly rate?

A I quoted them a fee of $75 an hour.

Q What instructions were you given in connection with your assignment?

A I was asked to look into the earnings of Y Ya, You Can't Catch Me and Angel Baby, to study them and to see what conclusion I would draw as to the activity on -- especially with Ya Ya and You Can't Catch Me which were actually recorded by Lennon in order to determine whether there were substantial increased activity outside of the actual Lennon recordings.

Subsequently the scope of my engagement was expanded to sit and assist Mr. Bergen who wanted me to review various schedules that Mr. Zucker prepared and submitted.

Q Were you given any written instructions on what

to do?

A I don't recall receiving any, although there might have been some.

Q Did you submit a written report to your employer?

A No. I just had prepared the various schedules.

Q Let me first ask you about Exhibit EK which has just been offered.

A Yes, sir.

Q Would you say, looking at your schedule for Ya Ya as reflected in Exhibit EK, that the activity in Ya Ya picked up substantially when John Lennon recorded it?

A It picked up substantially because of John Lennon's recording.

Q Well, it picked up when John Lennon recorded it, but you indicated there was also a rerelease at that point which generated additional activity.

A Well, I don't know without looking at the license or the release date when the K-Tel recording which was released within the time frame of the September '74 Walls and Bridges, certainly the MCA record had been released prior to the John Lennon recording.

Q When was the MCA recording released?

A Well, the first earnings reported were for the six months ending December '73.

Q Are you certain that that is based on the same rerelease?

A I believe it is. I don't recall seeing any additional licenses.

Q And the K-Tel record you don't know?

A Well, we could refer to the song sheet for a listing of licenses.

Q But you did not check it?

A No, I did not cross reference it.

Q Have you any way of telling whether the $2,027 generated by the MCA release could have been generated in part because of the popularity that the Lennon recording had given the song?

THE COURT: Where is the 8,000 --

MR. SCHURTMAN: That's in line 23, your Honor, the third column.

THE COURT: Yes, all right.

A No, there is no way of telling cause and effect.

MR. BERGEN: Your Honor, Exhibit DR shows that the MCA rerelease was in August of 1973, a year before Mr. Lennon even recorded the song.

MR. SCHURTMAN: I don't know why Mr. Bergen feels he can sum up now, but as long as we are arguing the point, for the six months ending June of '75 --

THE COURT: In other words, you are arguing that a previous record had its sales stimulated by John Lennon.

MR. SCHURTMAN: I think this exhibit shows it.

THE WITNESS: Not necessarily, because as was mentioned today and as I know as an auditor in this field, many companies maintain reserves for anticipated future returns which if the returns are not made or if the reserves exceed the returns are reinstated at a later date, so it's very difficult to tell based on a payment that that $8,720 that paid for the six months ending June of '75 actuall represents sales in that six months or represents sales of a year before on which there was a reserve that is now being paid up.

Q But you don't know that for a fact?

A I am saying there is no way of saying that.

Q There is a way if you had checked the figures.

A No. You would have to audit MCA's books.

Q Wouldn't you be able to tell from the royalty statements?

A No. It is just a quantity figure and you cannot tell how much represents current period activity or how much represents reinstatement.

Q You cannot tell?

A No.

Q As far as the Frankie K earnings, would it still be too early to tell? That came out in September of 1975.

A My understanding, in the September '75 period, the earnings were under $100. I don't know what has happened since then.

Q With respect to You Can't Catch Me which is also in your Exhibit EK, would it again be fair to say that the activity stepped up substantially when John Lennon recorded the song?

A No, sir.

Q You don't think the 7,388 and 6,969 figures on line 12 indicate a substantial step-up?

A No. $6,969 is the Lennon recording of the total of $7,388.

Q That's right --

A May I finish. The difference is only $400 from all other sources.

Q I wasn't talking about all other sources, I was talking about the stimulation of total earnings. Didn't they step up substantially after Lennon recorded the song? All earnings.

A Obviously, because we know that the Rock and Roll sold 342,000 units.

Q Now, your schedule does not indicate any earnings

from Steven Stills, does it?

A It couldn't.

Q Because it's too early to tell?

A That's correct.

THE COURT: And you don't have the Steven Stills thing on here, right?

THE WITNESS: No, that was licensed in 1976.

THE COURT: Can't we just put a note here? Couldn't you ad a note about that so it won't get forgotten?

THE WITNESS: Yes. It was January if I recall correctly.

Q I don't know if you were asked the question, but let me cover it.

Do you know who Steven Stills is?

A Yes.

Q Is he a well known successful artist?

A He was, yes. As part of a group Crosby, Stills, Nash and Young.

Q With respect to your Exhibit DE and the modified schedule DE-1 and also directing your attention to Plaintiff's Exhibit 302, did I understand your testimony correctly that the bulk of the adjustments you made on Mr. Zucker's figures relate to the double recording of

Ya Ya?

A To the recording of Ya Ya on Rock and Roll, that's correct.

Q Both foreign and domestic?

A That's correct.

Q And that if the court were to hold that no credit is to be given for the recording of Ya Ya foreign and domestic a second time, that you would have to change your adjustment by some $23,700?

A 50 per cent of that because of the writer's share.

Q Who told you to deduct the credit for Ya Ya?

A Nobody told me to. I did it because I saw that the Big Seven actually received payment on Ya Ya from Rock and Roll.

(Continued on next page.)

Q Did you review the transcript of the settlement agreement before Judge Griesa?

A No, I did not.

Q So you don't really know what its terms are, do you?

A No, I don't. Not specifically.

Q You simply assumed that if Mr. Lennon recorded Ya Ya on two separate albums, that some sort of a credit is to be given?

THE COURT: Isn't this some sort of legal argument?

MR. SCHURTMAN: No. I would like to find out what the witness thought he was doing.

THE COURT: He was making a calculation based on --

Q All right, let me ask you if this would change your assumptions. If I were to tell you that Mr. Lennon testified that when he recorded Ya Ya the first time in the Walls and Bridges album he was not doing it pursuant to the settlement agreement, would that change your assumptions?

THE COURT: What does he know about this?

MR. SCHURTMAN: Exactly, what does he know about it?

THE COURT: He is a witness employed by Mr. Bergen, and he is an accountant and he went through some calculations. Now, I assume he did it based upon his client's contention in the case. He would not be retained if he didn't do that. It is legitimate to do that. Whether I use his calculations or I use your calculations based on your version of the case is a matter for the lawyers to argue and me to decide.

MR. SCHURTMAN: I will have an opportunity to argue it, then.

THE COURT: Of course.

Q Let me ask you this. This I think should be within the witness' knowledge. Suppose Mr. Lennon had recorded Ya Ya on seven or eight other albums. For some reason he had recorded it eight or nine times. Would you give a credit for each of these additional recordings of Ya Ya?

MR.BERGEN: Objection. It never happened. We are dealing with a very specific set of facts, your Honor.

THE COURT: It is completely useless. Objections sustained.

Q Let's move on to the subject of the copyrights, Mr.Strauss. No, I am sorry, I want to ask you one more

question about your revised exhibit.

When Judge Griesa told you at the last session to take out figures relating to the additional 100,000 units of Rock and Roll, according to my notes you eliminated $4000, a minus figure of $4000 from Defendants' Exhibit DX.

How much did you eliminate from Defendants' Exhibit DX1?

A Well, if you recall just half an hour ago, or whenever we discussed this, I in my attempted based on the belief that Mr.Bergen submitted, I did not reduce it on my revised written exhibit, but I did orally explain after the Judge said that he would not permit this, that it would be reduced by $4000 less 50 per cent for writers which would increase my net figure in the recap portion of this by $2000.

Q How did you get a difference of $70 between the two exhibits by not rounding figures in one place and rounding them in another and also because in one place there was a very small adjustment for the Harry Fox Agency commission which I did not consider the second time around.

Q Mr.Strauss, based on your experience in the record industry, when a well-known artist like Mr. Lennon records a song, does that enhance the value of the copyright?

A Not necessarily.

Q Does it enhance it to the extent of adding his own earnings to the copyright?

A To the extent that if a major artist records a song that he would not otherwise have done, obviously there is the additional earnings created by his recording. No question about that.

Q Well, would there also be additional earnings created if that same artist were to re-release his own recording or include the song in another album which has been referred to as a best of albaum?

A If it was put into a best of album --

Q Let me show you your own Exhibit EK and I refer to the Ya Ya section. Doesn't that indicate to you that MCA re-released the Lee Dorsey recording?

A Yes. I said if it was put in a best of obviously there would be additional earnings.

Q And if Mr. Lennon records a song, is it likely, based on your experience, that Mr. Lennon's song will be released and re-released, and re-released by Mr. Lennon?

A I don't believe Mr. Lennon has anything to say about that. Isn't it the company under which he is under contract?

Q YOu don't know, do you? I am asking you whether you know.

A Under the normal relationship, and I haven't read Mr. Lennon's artistic contractual relationship, but the normal relationship is that this is up to the record company.

Q Right. And is it likely that if the song is successful that the record company will include Mr. Lennon's song in other Lennon albums thereby enhancing the value of the copyright?

A To the extent that any particular song is placed in a best of, yes. However, I have no way of telling when Capitol or Apple or whoever has the rights to put out a new record, whether they would consider any songs in this record or if they considered any of the songs in this record, whether they would consider Ya Ya as one of the "best of" or whether they would select any other recording, any other copyright in that recording.

Q Right.

A No way of knowing.

Q Until it happens.

A As far as I am concerned, there is no way of telling. Perhaps an A & R member of the company would know.

Q Do you know whether Mr. Lennon's songs, songs

either writtten or performed by Mr. Lennon have been re-released on several occasions?

A By other artists you mean?

Q Either by other artists or by Mr. Lennon himself.

A I dare say they have been. I don't know of my own knowledge.

Q Are you familiar with any of the songs that Mr. Lennon wrote, ei ther alone or in conjunction with McCartney?

A I just know that he has written a number of songs.

Q Do you know a publication called Phonolog Reports?

A Yes.

Q What is it?

A It is a listing of recordings.

Q Does it show the different artists that release the same songs?

A Yes, it does.

Q Let me show you Plaintiffs' Exhibit 500 for identification, which are some pages taken from the Phonolog Reports and I direct your attention to the song named Eleanor Rigby. Are you familiar with that song, sir?

A I have heard of the title. When it comes to music -- I may do a lot of work in the industry but I

don't profess to be a musician.

Q Is Eleanor Rigby one of the famous BEatle songs?

A Yes, I think so.

Q I ask you to look at this exhibit --

MR. BERGEN: Before we get any testimony on this, I am going to object on the same grounds as I did before, that whatever happened with Lennon-McCartney songs has no relevance to John Lennon singing somebody else's song, particularly where the song was a hit 15 years ago or 10 years ago. That isn't what the claim is here.

THE COURT: How much material do you have on that?

MR. SCHURTMAN: Is Mr.Bergen drawing a distinction between songs composed by Lennon and songs simply recorded by Lennon?

THE COURT: Yes, I guess he is.

MR. SCHURTMAN: Is that his distinction?

MR. BERGEN: I am saying I don't see what the relevance is of what happened to records, the sgons written by Lennon and McCartney after they were sung by the Beatles.

MR. SCHURTMAN: Your Honor, the basic relevance is that we are trying to show cover records whenever a song is released.

In other words, if a famous artist releases a song, whether he wrote it himself or whether somebody else wrote it, we are trying to show that there will be cover records. The cover records will include not only records by other artists, but they will include re-releases by that same artist.

Now, we have shown it in connection with non-Lennon songs, Oyes Como Va and all the other titles you heard, and now we are showing it in connection with Lennon songs. You can have it either way.

THE COURT: Ultimately we are going to get to the question, and I think this is the view of your witnesses -- I forget who it was, but what a record does depends on t he circumstances of that record.

MR. SCHURTMAN: Of course.

THE COURT: A lot of things can happen. Other artists can record, the same company can put a single out of this particular song from an albu m, it can appear in a best of album. Lots of things, depending on the desirability and characteristics of that song. I am going to let you put in that type of proof that you are putting in now and obviously in the last analysis I will have to see what the closest analogy is to our situation and if I don't feel this is analogous, I won't give much weight

to it, but I won't know until I hear it.

MR. SCHURTMAN: Let me just say that we concede, and indeed we urge that a song that is composed by Mr. Lennon himself does have a greater saleability than if Mr. Lennon goes out and records somebody else's song.

As you know, that has been our position all along in this case and it continues to be our position and as Mr. Bergen now agrees with me on that, then I think we are making some progress.

THE COURT: Let us try to not make progress that way, but I will hear this.

MR. SCHURTMAN: In any event, what I would like to do, and this witness is as appropriate as any, is to offer four excerpts from the Phonolog pages, these are published reports, showing all of the cover records and songs. They don't give royalty figures.

THE COURT: Of what.

MR. SCHURTMAN: These particular songs that I have selected are all Beatle songs tha twere written by Lennon and McCartney.

Now, when we tried to get royalty information from Mr. Bergen who refused to give it to us, so at least I will put this in.

THE COURT: All right.

MR. SCHURTMAN: Plaintiffs' Exhibit 500 would be Eleanor Rigby by Lennon-McCartney, and I think you will find there were some 42 cover records, including both --

THE COURT: This is what, 500?

MR. SCHURTMAN: Yes. It is an arbitrary exhibit number. I have marked off the Eleanor Rigby listings.

Exhibit 501 is ano ther Lennon-McCartney song, Let me Be, and again it shows all the cover records, both by the Beatles and by other artists.

Exhibit 502 is anot her Lennon-McCArtney favorite, Michelle, which shows all of the cover records, including both the Beatles and other artists.

THE COURT: That is 502?

MR. SCHURTMAN: Yes.

Finally Exhibit 503 is another Lennon-McCArtney song called Yesterday, which shows all of the cover records by the Beatles, and others.

THE COURT: ARe these some of the very popular BEatle songs?

MR. SCHURTMAN: Yes, your Honor. I was just glancing at Yesterday, Exhibit 503, and I notice it was re-recorded by somebody like Frank Sinatra, and you will find a lot of other well-known artists.

THE COURT: What if we just played Angel Baby and then played Let it Be. They are different.

MR. SCHURTMAN: They are different.

THE COURT: I am afraid we are back in the music business. It is going to boil down to some judgment about, as the witnesses seem to agree, some judgment about the song. In other words, John Lennon might record a song which did well or poorly or John Lennon's recording, but it may be a completely different question as to how many other artists picked that up and recorded it and it is going to depend on the song.

nd 2B

(continued on next page.)

MR. SCHURTMAN: But you see, we will never know because Mr. Lennon didn't record the song that he was supposed to. That is my problem.

THE COURT: I don't think anybody says we will ever know, but we have to try to reach an estimate.

Now, it is relevant to try to form a judgment as to what kind of a song this is. Now I am not in the business, but I think that there has got to be some way and I don't want to have that elaborate equipment dragged down here again. That would be wasteful, but I am rather persuaded that we are going to have to hear Angel Baby again and perhaps the original recording of Angel Baby, and John Lennon's recording of it on that. I guess it appeared on the tape of the Roots album, and compare it with things like Imagine or Michelle or Let It Be.

MR. BERGEN: I would be glad to make some arrangement to do that.

MR. SCHURTMAN: We will do that, your Honor, except I do want to point out that one of the leading experts was Mr. Lennon himself who apparently like Angel Baby.

Now you may not like it, but Mr. Lennon liked it.

THE COURT: Believe me, I am past the point , I am not deciding this case on what I like. But there is some modicum of evidence in the case which has tried, or

at leeast certainly Mr. Robinson's testimony, tried to delineate between the types of songs which would be susciptible to repetition over and over again in the records of other artists and other types of songs that wouldn't be. That is just one witness.

Now, we have a lot of examples of songs that had been produced, and I don't think it would be just a vain quest to at least hear the music we are talking about. Not everything, but certainly I think at this point we ought to hear Angel Baby and really, you know, I have heard Let It Be.

I think Let It Be and Angel Baby are very much different.

MR. BERGEN: Your Honor, maybe I could get a decent portable rather than dragging in all this equipment. In this case it reallydoesn't make any difference in the quality.

THE COURT: I am not interested in the quality of sound.

MR. BERGEN: I am sure we can rent one. A decent portable and bring it in and it will only take, you know, a half hour or so to play four or five of them.

Does anybody have that original recording of Angel Baby?

MR. BERGEN: Yes, I do.

THE COURT: I will receive all these tabulations. 500, 501, 502 and 503.

(Plaintiffs Exhibits 500, 501, 502, 503 were received in evidence.)

MR. SCHURTMAN: Shall I proceed?

Q Mr.Strauss, would it be fair to say that when an artist like John Lennon or any other well known artist records a song, that it enhances the copyright, or may enhance the copyright in three separate ways? First, the immediate royalties, mechanical royalties generated by that particular record. That is Number 1, right?

A Yes.

Q Secondly, the fact that the same song may be re-released on other albums as a single and in the future for that same artist.

A Not with respect to a single. The single would have been released by now, I would say in the normal course of events in the music industry, if Ya Ya was going to be released as a single, it would have been released a long time ago by Lennon.

Q Would you say that the second category would be re-releases of that same artist's song and whatever

compilation it might be put in?

A It is speculative but it is possible. I can't say it will not happen.

Q It does happen, doesn't it?

A If it is the hit song. After all, The Best Of, meaning the best, and one would have to consider that of the 10 or 12 records, songs on the Walls and Bridges for example, if that was the best song on the record.

Q With respect to that song --

A And normally if I may add, the best song would have been released as a single. Now I don't know if there were any singles released for the Walls and Bridges.

Q Do you know for a fact that Best Of albums are usually based on songs that have been released as singles before then?

A Not always.

Q No.

A But the best song would normally be exploited by the record company, try to derive extra revenue by releasing it as a single. It is only good business sense to do that.

Q Or they might re-release it in an album?

A Ultimately.

Q The third category I asked you if there were three categories of enhancing the copyright. We have covered two. The third category would be if other artists decided to re-record that same song, based on the fact that someone like Mr. Lennon has recorded it, is that correct?

A If one can go into the minds of the other artists as to why they are recording.

Q Let me ask you this. Is it possible to make a projection of future royalties based on past experience? Have you ever done it?

A Yes, on a catalog basis, we would do it.

Q Explain what you would do.

A We would normally take the earnings on a catalog basis and lump them together and project based on the length of the copyrights what potential future earnings are and take into consideration any spurts or lags, so to speak, any large jumps that may not be recurring --

Q YOu have seen that done?

A Yes.

Q You have done it yourself?

A Under my supervision.

Q Turning to the song Oye Como Va. Are you familiar with that song by the way ? Have you heard it?

A I am sure I have, but I don't recall specifically.

Q Are you familiar with the artist named Santana?

A Yes.

Q Have you heard them before?

A Yes.

Q How would you ran Mr. Santana compared to Mr. Lennon?

A I wouldn't attempt to rate the two. I don't know.

Q You don't know?

A If you want my personal opinion, and this may come as a shock, my opinion of Mr. Lennon as an individual artist, is much lower than when he was part of the Beatles.

Q Doesn't come as a shock.

Can you tell me whether the Rolling Stones in 1965 are more or less popular than Mr. Lennon in 1975, if you know?

A I really don't know, and again your are separating Mr. Lennon as an individual as compared to one of the group of the BEatles. A lot of factors, frankly. I would say that the Rolling Stones were quite popular in 1965. How I would peg them in '65 as to Mr. Lennon as an individual in '75, I wouldn't even dare to make a guess. I just

don't know why.

Q Do you know whether the Rolling Stones generated many cover records?

A I don't know.

Q Are you familiar with the term "coverable"?

A Coverable?

Q Yes, have you heard it in the industry ? What does it mean?

A It means the type of song that wuuld normally be covered.

Q Do you know whether the rolling Stones are regarded as a coverable group?

A I never thought of them one way or the other in that connection.

Q In challenging some of Mr. Zucker's statistics, you made a point of the fact that some of the records and the various songs that he had testified about, had been sold through record clubs.

A Yes.

Q In the first place, do you know for a fact that these albums or records have been sold through record clubs?

A Which records are you referring to specifically?

Q You testified about a number of the songs, Oye Como

Va, Maybe, Daddy's Home, and My Boy Lollipop.

A I will say this, without looking at specific royalty statements, that an artist recorded by CBS such as Santana, and an artist recorded by AAM and I don't recall the name, but one of the songs was so recorded, are normally also distributed through Columbia Record Club. And there would therefore normally be royalty activity from the Columbia Record Club, the copyright owner of those songs, the songs recorded by those artists.

Q What was the point of your emphasis on record clubs? In other words, who normally buys records through record clubs? What type of people?

A Better ask the CBS marketing people. I would say mostly people who don't live in major centers, population centers.

Q Suppose you have an artist like Stephen Stills or Franke Gee, and he wants to listen to Lennon album, a new Lennon album to determine whether he should record some of the songs in the Lennon album. Do you think Mr. Stephen Stills would get his album through a record club?

A I never suggested that, no.

Q No.

A I was suggesting that that was a source of revenue to the copyright owner as a result of an artist

singing that song and getting the copyright owner getting additional revenue through sales of the record club which Mr. Lennon, or the copyright owner of Mr. Lennon's selections would not enjoy, because Capitol is not distributed through a record club.

Q Right. But is it possible that when another artist decides to re-record a song which Mr. Lennon has recorded, that the original artist may be distributed through a record club?

A Well, of course.

THE COURT: WE will take a short break.

End 3A

(continued on next page.)

Q I just have two or three more questions, Mr. Strauss.

A Yes.

Q Have you ever been involved in the sale of a publishing company?

A In what capacity?

Q In your capacity as an accountant, have you worked on the sales of publishing companies?

A Worked in the purchase.

Q When somebody purchases, somebody else sells it.

A I am just recalling. I can recall times when we represented purchasers.

Q Now, in figuring out the value of a publishing company, do you have to look at the value of the copyrights owned by the publishing company?

A Yes, sir.

Q Do you assign some sort of a multiplier to earnings in order to arrive at the value of a copyright?

A Well, some people -- yes, there will be a factor based on earnings.

Q And what type of a multiplier do you use?

A There is no fixed -- in our way of doing it, I know some people glibly toss out five times publisher's share or six times publisher's share. When we do that,

and I hesitate to launch into it, because I have been asked to speak on that very topic on a two-hour address and I hate at this point to go into all the details that I will cover in that address.

Q Without going into a two-hour address, I don't think any of us want to listen to at this point, I may come to it when you lecture, do you look at the earnings of each copyright?

A The major copyrights.

Q The major copyrights. And you apply any sort of a multiplier effect to these earnings in order to figure out their value?

A Well, we'll put some type of multiplier effect based upon the earnings, the trend, the life of the copyright, any other factors.

Q And you will look at the total earnings of the copyright, do you not?

A Over a long period of time, yes.

Q In order to determine the sales value or purchase value of that copyright?

A That's correct.

Q You testified on your direct examination that your figures demonstrated, your reserve demonstrated that when a popular artist rerecords a song, much of the

subsequent increase in copyright royalties comes from that artist himself.

A I think we were addressing a specific instance, yes.

Q Again, we're covering a part of what I asked you about before. If Mr. Lennon records a song, how long would the copyright owner be entitled to continue to get earnings from that recording?

A As long as (a) the recording sold and (b) as long as he was the copyright owner.

Q And that could be for the life of the copyright and for the renewal of the copyright?

A That's correct, theoretically. As a practical matter that normally doesn't happen. I mean you can get an oddball situation. I mean somebody can bring in a song like "White Christmas" and Bing Crosby recording of White Christmas sell and continue to sell. But I would say that that is the very, very unusual situation.

The trend for the most pop type songs suprt and then a decline. There may be jags, increases periodically but the trend is not to have a song that will generate any substantial earnings over the life of the copyright. That is very unusual.

Q You say the figures that Mr. Zucker prepared

for songs like Oye Como Va and so on?

A If course I did.

Q Did you observe the fact that he covered only five years earnings?

A Yes.

Q Would you say that that is a reasonable approach, limiting it to five years instead of the 28 year life of of a copyright?

A For this purpose?

Q Yes.

A No, I think that perhaps some other songs could have been studied that had activity, the so-called spurt, if you will, in an earlier period to see what would have happened.

Q It could have been but five years does not strike you as an unreasonable period, does it?

A No.

Q Finally turning back to Oye Como Va, the Santana rerecording. If an artist like Santana can enhance the value of a copyright by some $179,000 over the five year period, do you think it is reasonable to assume that an artist of Mr. Lennon's stature could also enhance the value of a copyright by some $179,000 over a five year period?

A Based on what I see so far for the last year on

"Rock and Roll" and a year and a half with "Walls and Bridges" with respect to the songs embodied on these records, no way.

Q You have got another four years go to, right?

A That's right. But history in this industry is that big spurt in sales is when the record is first released. The first six months after release normally and if that hasn't happened, barring very unusual circumstances, it will not happen.

Q But that does not take into account rereleases and rerecordings?

A Only if it is the quote hit song on the record.

Q But when you speak of a spurt within the first six months, you are talking about the artist's own release of that particular song?

A That's correct.

MR. SCHURTMAN: I have no further questions.

XXX

REDIRECT EXAMINATION

BY MR. BERGEN:

Q Mr. Strauss, showing you Plaintiff's Exhibit 500, the Phonolog report, what does that show with respect to a song entitled "Eight Days a Week"?

A Eight Days a Week.

Q Is that a Beatles' song?

A Yes, Lennon and McCartney. And on this it lists Beatles three times, and then three original records, one by Enoch Light, one by Billy Preston and one by Harum Procol.

Q Can you point out any other song titles on Exhibits 5001, 501, 502 or 503 by what you would call major artists where there have been no cover records following the original recording?

A Yes. Right below it is a song called "Light Days on the Road" and it is hard to tell, by the way this is listed in alphabetical order, so one cannot tell which is the original recording and which is the cover recording. But on Light Days on the Road, there is two recordings, one of a single and one of an LP by Aretha Franklin who is one of the largest and most successful black soul artists and there is just one other record by somebody called Foghat.

Q Can you point out just one or two other examples?

A Yes. Here is a song called Eighteen recorded on a single and an LP by Alice Kooper, one of the biggest rock and roll artists of the '70's. No cover records.

Q Okay. Thank you. I am sure there are others.

MR. BERGEN: I have no other questions, your Honor other than being put on Mr. Levy and then Mr. Strauss could just have an opportunity to look at those schedules that

we got, I think I could then put him back on.

THE COURT: You want to question Mr. Levy?

MR. SCHURTMAN: You are calling him?

MR. BERGEN: I am calling him for cross examination which I was never able to do in this case.

M O R R I S L E V Y, recalled.

CROSS EXAMINATION

BY MR. BERGEN:

THE CLERK: You are still under oath.

Q Mr. Levy, is it your position and the position of Big Seven that the value of a copyright of Ya Ya was not enhanced by Mr. Lennon's version on Walls and Bridges because it was an abbreviated version of the song?

A Because it was abbreviated, was a fun version, did it with his son as a gag for 50 seconds.

Q Did he ever tell you it was a gag?

A Yes.

Q He told you personally it was a gag?

A Yes, sir.

Q When?

A When we met in the Cavaleroso that fateful evening of October something. He told me that he only did it as a laugh for his kid. He did it the last few seconds because his son was at the session, his son played drums.

Q Is it also your position that it wasn't enhanced because it was not a fully orchestrated version of Ya Ya also? I believe you testified to that previously.

A I believe I did. It was a fun recording. It was just done as a gag for 50 seconds or 40 seconds.

Q There was nothing wrong with the version of Ya Ya that Mr. Lennon did on Rock and Roll, was there?

A I don't believe so, no.

Q When a license is issued for a new version of one of the songs in the Big Seven catalog, do you usually obtain a copy of the record for your files?

A I would assume we do.

Q Is the purpose of that to find out how the record sounds?

A No, the purpose of that I think is to maintain a library of -- naturally we are curious how it sounds too, I don't want to mislead you but we also try to maintain a library of all the various recordings on any copyright.

Q Do you know whether when the Rolling Stones recorded "You Can't Catch Me" you obtained a copy of the record containing that version of the song?

A I couldn't give you an honest answer. That was '65. I couldn't tell you.

Q I believe the position has been taken by your

attorneys and by some of the expert witnesses, that Mr. Stills' license of You Can't Catch Me shows that Mr. Stills recorded that song after Mr. Lennon, is that correct?

A Yes, sir.

Q And you have also taken the position that that shows that since Lennon recorded it, artists like Mr. Stills will record it?

A Well, my experience of 25 years, Mr. Bergen, is whenever you get a big artist to do a song, you certainly suppose it and you have a chance of getting a lot of additional records. It happens that way. That is my experience for 25 years as a publisher.

Any time we get an important artist to do a song, we feel that the basic value of the copyright has gone up.

Q Do you know the title of the album on which Mr. Stills' version of "You Can't Catch Me" appears?

A No, sir.

Q Do you know whether the Stills record was a single?

A No, sir, I don't.

Q Have you ever heard the Stills record of You Can't Catch Me?

A Since it came out I have been in court most of the time, Mr. Bergen.

Q Can you answer the question, please?

A No, sir, I haven't heard it.

Q Do you have a copy of the record?

A No, I don't, I don't here.

Q I'm not asking you here. Has anybody at Big Seven ever obtained a copy of that record?

A I would imagine they did, but I couldn't say either way. I would imagine they did.

Excuse me, Mr. Bergen. What we usually do also, is we try and get 25 to 50 copies of each one if we have an American recording on a record, because then we send it to our foreign affiliates all over the world. There is a weekly mailing that goes out on that to make them aware. So I am pretty sure, I am 99 per cent sure we got it and it was probably mailed out all over the world to our affiliate publishers.

Q Have you ever asked anybody at Big Seven whether they obtained a copy of the Stills version of You Can't Catch Me?

A No, sir.

Q Do you know whether your attorneys have tried to get a copy of the record?

A No, sir.

Q Did anybody ever tell you when that record was

recorded?

A No, sir.

Q Did you ever ask anybody?

A No, sir.

MR. BERGEN: Your Honor, I would like to mark as Defendant's Exhibit EL, an album entitled Steven Stills Live.

(Defendant's Exhibit EL marked for identification.)

XXX

Q I show you Defendant's Exhibit EL for identification. I ask you if you have ever seen that record.

A No, sir.

(Continued on next page.)

Q I show you the sleeve of the record which I would also like to mark as Defendant's Exhibit EL-1.

XXX (Defendant's Exhibit EL-1 marked for identification.)

Q Mr. Levy, I show you Exhibit EL-1. Does EL-1 indicate when that record was recorded? Up at the top of the record, Mr. Levy, when it was recorded?

Doesn't it say recorded live March 8th and 9, 1974?

A In the Auditorium Theater in Chicago.

Q And that was a year before the Lennon album was released, wasn't it?

A Yes.

Q It was recorded seven months before Mr. Lennon even recorded You Can't Catch Me, isn't that so?

A Correct.

THE COURT: When was it recorded, please?

MR. BERGEN: March 8th and 9, 1974 and it's indicated on Exhibit EL-1 which is the sleeve.

THE COURT: Has this [illegible] the song?

MR. BERGEN: Yes. The sleeve indicates that on side 2, which is entitled the acoustic side, track 2, and it's a medley. 2A is Crossroads and 2B is You Can't Catch Me.

I would just like to point out for the record that Defendant's Exhibit DS, which is the song sheet for You Can't Catch Me, indicates the license WEA Music of Canada, Ltd. for the Steven Stills record is number S -- the record number is number SD18156.

THE COURT: A little slower. The song sheet --

MR. BERGEN: For You Can't Catch Me, which has the Still license on it.

THE COURT: All right, the Stills license is for album number what?

MR. BERGEN: SD18156 and that same number appears on the sleeve, which is Exhibit EL-1, and on the record jacket itself, EL.

THE COURT: All right. 18156, is that right?

MR. BERGEN: 18156.

THE COURT: All right.

Q So Mr. Stills couldn't have recorded You Can't Catch Me because John Lennon recorded that?

A May I see a date on the bottom about October '75?

MR. SCHURTMAN: I am confused because the sleeve says recorded live for Gold Hill Enterprises in October 1975.

MR. BERGEN: No, it doesn't. It says mixed and

edited in Caribou Ranch in October '75.

A On, it was mixed and edited in October of '75.

MR. SCHURTMAN: When was this released?

MR. BERGEN: In December of '75 in the United States and January of '76 in Canada.

MR. SCHURTMAN: So Mr. Stills gave the live performance in 1974 but the record wasn't released until after Mr. Lennon recorded You Can't Catch Me?

MR. BERGEN: The testimony has been that Mr. Stills recorded You Can't Catch Me because Mr. Lennon did. He did it a year before.

MR. SCHURTMAN: He released it a year later.

MR. BERGEN: Atlantic Records released it a year later. Mr. Stills is now under contract to Columbia.

THE COURT: Can we agree on the chronology, that the song was recorded in March 1974, is that right, everybody?

MR. BERGEN: That's correct, your Honor.

THE COURT: Mr. Schurtman?

MR. SCHURTMAN: It says it was recorded live.

THE COURT: Was this a live performance?

MR. SCHURTMAN: Apparently a live performance at the Auditorium Theater in Chicago.

THE COURT: This and a lot of other things.

MR. SCHURTMAN: Right, in March 1974.

THE COURT: Then when was it prepared for recording?

MR. SCHURTMAN: In October 1975.

MR. BERGEN: Not prepared for recording, it was mixed and edited for release in October of '75.

THE COURT: What did Mr. Bergen just say?

MR. BERGEN: It was mixed and edited in October of '75.

THE COURT: When was it released?

MR. SCHURTMAN: I am not certain, but presumably January of '76.

MR. BERGEN: That's the Canadian license.

THE COURT: Let's say December '75 or January '76.

MR. SCHURTMAN: Right.

THE COURT: Okay, any other questions?

Q Mr. Levy, it is your testimony that you didn't know that Mr. Stills recorded this album a year before the Rock and Roll album was released?

A I didn't know that, sir. We knew it when we got the license.

MR. BERGEN: Your Honor, I don't know whether this is the proper time, but I would like to move to strike

all of the testimony of the plaintiff's experts with respect to the Stills record of You Can't Catch Me and its importance as to the enhancement and value of the copyright of the song.

THE COURT: That's not a motion to strike.

MR. BERGEN: Their opinions and the questions from Mr. Schurtman were all based on the Stills song being recorded after Mr. Lennon's. I can point you directly to the testimony. There was testimony by Mr. Beinstock at page 3615 and 3616.

THE COURT: Let's see, Beinstock. What date?

MR. BERGEN: It was the 8th. No, the 15th, your Honor.

THE COURT: 3 what?

MR. BERGEN: 3615, 3616. He starts at line 19 on 3615 and up through line 7 on 3616.

THE COURT: I'd say it's like the situation with any expert witness. To the extent that the facts they rely on are not accepted by the tryer of the fact or disproven, that affects their expert testimony, but I don't think you strike all the testimony.

MR. BERGEN: No, I am not striking all the testimony. I am just talking about the testimony where they were given the factual information that Mr. Stills recorded

this after --

THE COURT: I would like a list of the references. I am not going to grant a motion to strike, but it would help me to have a list of the references.

MR. BERGEN: The other testimony is to Mr. Weisser's testimony at --

THE COURT: Just a minute, please.

Then Weisser?

MR. BERGEN: Mr. Weisser at 3641.

THE COURT: I will just note that.

MR. BERGEN: There was also some testimony by Mr. Kahl at 3500 and 3516.

THE COURT: Any other questions of Mr. Levy?

MR. BERGEN: Yes, your Honor.

MR. SCHURTMAN: Are you offering that?

MR. BERGEN: Yes, I am.

MR. SCHURTMAN: I would like to ask Mr. Bergen a couple of questions on voir dire since he is offering it without a witness. May I ask him?

THE COURT: Just -- sure. What is your question?

MR. SCHURTMAN: Can you tell the court whether you know why Mr. Stills didn't actually release an album after he made the live recording in 1974?

MR. BERGEN: Yes, I think I know.

MR. SCHURTMAN: All right.

MR. BERGEN: Because Mr. Stills left Atlantic Records last year and went to Columbia and I understand it is the practice in the industry that when artists leave one label, if there is anything in the can, as they say, whenever that material is released in some form and if I can just have the record again, please, it indicates on the sleeve again that the mixing and editing was done at Caribou Ranch, Nederland, Colorado by Tom Dowd, Don Gehman and John Bowen, which seems to indicate that Mr. Stills had absolutely nothing to do with releasing the record.

MR. SCHURTMAN: Do you know why a decision was made to release the record showing You Can't Catch Me some 10 months after Lennon had released You Can't Catch Me?

MR. BERGEN: No.

MR. SCHURTMAN: Do you know whether all of the songs that were recorded live by Mr. Stills in the Chicago auditorium were included in this album?

MR. BERGEN: No, I don't.

MR. SCHURTMAN: Do you know why You Can't Catch Me in particular was included?

MR. BERGEN: I gather because it's part of a medley and you would have to chop the medley in half.

MR. SCHURTMAN: Do you know why that particular medley was included 10 months after Lennon had released You Can't Catch Me?

MR. BERGEN: No, I don't.

THE COURT: I will receive that. You are offering Exnibit EL?

MR. BERGEN: And EL-1, your Honor.

THE COURT: Received.

MR. SCHURTMAN: I object to it for a lack of foundation.

THE COURT: Overruled.

(Defendant's Exhibits EL and EL-1 received in evidence.)

XX

(Continued on next page.)

Q Mr. Levy, do you agree with Mr. Bienstock's testimony that the Parkays are a well-known group?

A The Parkays?

Q Parkays, P-a-r-k-a-y-s.

A I am not sure.

Q Are you familiar with that group?

A No, I am not personally, no.

Q Exhibit DS indicates that the Parkays -- a license was issued to the Parkays in May of 1970 for You Can't Catch Me, doesn't it?

A Yes, sir. Is that an American or Canadian license, Mr. Bergen?

Q It says Warner Brothers Records of Canada, Ltd.

A I think I remember it now. Mr. Bienstock said they were a big group in Canada. That is probably why I am not familiar with them here. He said they were a big group in Canada.

MR. BERGEN: At this time, your Honor, I would just like to play, it will only take a few minutes, the version of You Can't Catch Me by Mr. Stills. May I have the Court's permission to do so?

THE COURT: Sure.

MR. BERGEN: May I mark this as EM.

(Defendants' Exhibit EM was marked for identification.)

MR. BERGEN: Your Honor, this is the tape of the Stephen Stills record and I offer it in evidence.

THE COURT: All right. Received.

xxx (Defendants' Exhibit EM was receivdd in evidence.)

MR. BERGEN: For the record, we have to listen to the first three minutes of the first part of it immediately.

THE COURT: All right.

(Defendants' Exhibit EM played.)

Q Mr. Levy, would you say that Mr.Stills' version of You Can't Catch Me was an abbreviated version of the song?

A How long was it on there for?

Q A minute and six seconds.

A I would say it was abbreviated.

Q Would you also say that the Stills' version is not fully orchestrated? In other words, there is just Mr. Stills playing the guitar?

A I don't know that.

Q Let me just show you the album. Does the sleeve, EL-1, indicate that on that side where You Can't Catch me appears, that the only player is Mr. Stills?

A And the acoustic guitars. I believe there is more than one guitar.

Q Just a few more questions.

Were you aware in October of 1973 when the settlement of the Comtog lawsuit was made, that Mr. Lennon was going to record some Rock and Roll songs with Mr. Spector?

A Not exactly the same time. A little while after that.

Q I would just like to read to you from your deposition at page 40, Mr. Levy, Line 11.

"Q Were you aware at any time in 1973 that Mr. Lennon was recording a set of Rock and Roll songs?

"A In '73?

"Q Yes.

"A Yes, that was when the settlement was made. I believe he was going to record Rock and Roll songs with Phil Spector when the original settlement was made."

Do you recall that testimony?

A Yes.

THE COURT: Read the deposition again.

"Q Were you at any time in 1973 aware that Mr. Lennon was recording a set of Rock and Roll Songs?

"A In '73?

"Q Yes.

"A Yes. That was when the settlement was made. I believe he was going to record Rock and Roll songs with Phil Spector when the original settlement was made."

Didn't you or Big Seven send a whole group of old Rock and Roll songs or tunes within a couple of weeks after the settlement to Mr. Lennon?

A Yes.

Q Weren't you told later that Mr. Lennon liked three of the songs and that he was going to record them in the next Rock and Roll album?

MR. SCHURTMAN: I object to that, your Honor.

THE COURT: Let me hear the question.

MR. SCHURTMAN: I object to the switch at the end of the question.

THE COURT: Let me hear the question.

(Record read.)

THE COURT: What is wrong with the question?

MR. SCHURTMAN: My objection is the settlement which you approved in open court simply spoke of the next album. This is an attempt to convert the next album into the album Rock and Roll is parol evidence and this is no place for parol evidence.

THE COURT: No.

MR. BERGEN: That was a direct quote from Mr. Levy's testimony on page 42 and I would like to read it.

THE COURT: I overrule the objection.

MR. BERGEN: I would like to read that portion of it. It is three lines of his testimony. Page 41.

"Then we got the word later on through Seider that John liked three of the songs and that he was going to record them during that -- in the next -- in the Rock and Roll album, but when he started I couldn't be sure."

Q Now, what was the purpose of sending this group of Rock and Roll songs to Mr. Lennon?

A He requested them. We sent him a whole bunch of songs because he wanted to see a lot of the songs from the Big Seven catalog. We didn't only send Rock and Roll. I think we sent other songs, too, Mr. Bergen, but I couldn't be quite sure. We sent -- I know there was records of stuff that was from the sixties that boiled down to the fifties, but we sent him a lot of our hits.

Q I would like to read to you from page 42 of your deposition:

"Q What was the purpose of sending that bu nch of Rock and Roll songs?

"A At that time so he would pick the two pieces You Can't Catch Me to record in that album."

Do you recall that testimony?

A Yes.

Q Were you told later that these were already recorded for his, Lennon's, next album?

A There was some conversation. I was told later that two of the songs were done and there was even some conversation that maybe Angel Baby would be a single. Somebody gave me that message.

Q But you recall being told that they were being recorded or had already been recorded for Mr. Lennon's next album?

A I believe I was told somewhere along the line, but I am not sure.

MR. BERGEN: I have no further questions.

THE COURT: Anything else, Mr. Schurtman?

MR. BERGEN: I am sorry, I do have just a couple.

Q Mr. Levy, I believe you said that this reference on the song sheet DR for Ya Ya which refers to two licenses issued to Polydor for the BEatles in February and April of 1970, that that was incorrect, that that record was never released?

A No, I said that as far as I knew it was never released and it probably wasn't in the normal sense of the Beatles and it probably wasn't because we received some

royalties from Polydor because the BEatles have never been with Polydor, never.

Q Don't the record of Big Seven indicate royalties --

A From Polydor.

Q From Polydor for the Beatles on Ya Ya?

A Yes, and I still can't figure it out because the Beatles never recorded for Polydor. We have looked at that and we are trying to figure it out to this day since it came up in court a few weeks ago. It says Beatles on the license and the money comes from Polydor, but we all know the Beatles never recorded for Polydor and Polydor is a bigger company than EMI.

MR. BERGEN: No further questions.

THE COURT: Anything?

MR. SCHURTMAN: No.

THE COURT: All right, you may step down.

(Witness excused.)

THE COURT: Where do we go from now?

MR. BERGEN: May I have a couple of minutes to talk with Mr. Strauss about reviewing the exhibits?

THE COURT: Okay.

(Recess.)

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MR. BERGEN: Your Honor, I would like to call Mr. Strauss back again.

THE COURT: All right.

L E O S T R A U S S, JR., resumed.

(continued on next page.)

4B

DIRECT EXAMINATION (continued)

BY MR. BERGEN:

Q I show you Plaintiffs' Exhibits 201, 202, 203 and 204, looking at the one for My Boy Lollipop, which is 204, EN for identification.

xx (Defendant's Exhibit EN was marked for identification.)

Q Mr. Strauss, I show you Derendants' Exhibit EN for identification, which is a schedule, or copy of a schedule that we were given earlier inthe afternoon by Mr. Kanzer and it is entitled "My Boy Lollipop, analysis of earnings by Artists Domestic."

Can you compare Defendants' Exhibit EN for identification with Plaintiffs' Exhibit 204 and tell the Court what EN shows in relation to 204?

A Yes. The 204 is a summary of earnings both performance and mechanical, domestic and foreign for the song My Boy Lollipop by six month periods. Exhibit EN is a detailed analysis by artists of the domestic and mechanical portion only. Thus 204 shows gross domestic and mechanical of$17,366.

THE COURT: In what period?

THE WITNESS: For the entire period of that

schedule from June 1957 through December 1975. This schedule which apparently started in August of 1964, which correlates with the six months ending December, 1964 on the Exhibit 204, the prior earnings being just slightly more than a hundred and therefore not significant.

The total earnings that they analyzed on EN aggregating $16,140 meaning that for some reason, difficulty or time problems,they couldn't analyze roughly $1200 of domestic mechanicals. But with respect to what they did analyze, they have a spread sheet by artist showing the earnings.

What does that show in terms of what portion of that total of $17,000 is attributable to the version of the song by Millie Small?

A Of the total of this schedule, Mr. Bergen, which is $16,000-odd, the Millie Small version was $14,200.

THE COURT: Let's see. Exhibit EN analyzes how much of that?

THE WITNESS: $16,140 of the domestic gross mechanical.

THE COURT: What are the proportions?

THE WITNESS: 204 domestic gross mechanical, 17,000 --

THE COURT: What is the breakdown of EN?

THE WITNESS: Millie Small is $14,234 and there is no other artist that aggregates over $350.

THE COURT: How many other artists are involved, other artists?

THE WITNESS: 14.

THE COURT: 14 other artists. What is the total of the other artists?

THE WITNESS: Total of the other artists is approximately --

THE COURT: 1900.

THE WITNESS: Well, yes, except they have one column called unknown of $240, so if you subtract the 240 from the 1900, there is roughly 1700 for the other artists.

THE COURT: Let's just call it 1900.

THE WITNESS: Well then, if you count unknown would be 15 other artists.

THE COURT: And then none over what?

THE WITNESS: $350.

THE COURT: This is for what period of time? The 16,000 was for what period of time?

THE WITNESS: Beginning August, 1964, through December 1975, December 31, 1975.

THE COURT: All right. What about the European?

THE WITNESS: The one thing that they tried to

show was there was this recording Maggie Mae, and they earned $131,000. That is something else.

They didn't supply that and with all due respects I can understand why, because to get the information from the foreign publisher as to what the recording is, would require some time.

MR. BERGEN: Can we mark this, please as Exhibit EO, offering the analysis of earnings--

Q First of all, may I offer in evidence --

MR. SCHURTMAN: Before you get to that -- on that last point about Maggie Mae, what did he say we didn't supply?

THE COURT: I odn't know, because I haven't seen the exhibit.

MR. SCHURTMAN: Maggie Mae foreign was in the original exhibit 204.

THE COURT: I guess there is no analysis of that.

MR. SCHURTMAN: There was nothing to analyze it was Maggie Mae.

THE WITNESS: I respectfully disagree. This schedule does not necessarily indicate that the total foreign mechanicals were from Maggie Mae. Your 204, that was one of the problems, both domestic and foriegn.

MR. SCHURTMAN: I see. Inother words, you think there may have been other artists foreign?

THE WITNESS: There could have been some foreign royalties from Millie Small or any of the other 15.

MR. BERGEN: May I offer EN into evidence,,your Honor.

xxx (Defendant's Exhibit EN was received in evidence.

(Defendants' Exhibit EO was marked for identification.)

Q I show you Defendants' Exhibit EO for identification which is the analysis of earnings by artists for Daddy's Home and using Plaintiffs' Exhibit 202, would you do the same thing you did for the previous one?

A Right. Yes. For Daddy's Home, Exhibit 202 shows gross domestic and mechanicals of $50,600 of which on Exhibit EO they have analyzed $50,200 for the same period.

Q Can you tell the Court what that shows?

A Yes.

THE COURT: What is the total figure analyzed again?

THE WITNESS: 50,200.

THE COURT: The recording is what, the song is what?

THE WITNESS: Daddy's Home. The earnings for GErmaine Jackson shows total earnings of $24,100, and that was the first earnings of that were received by the Big Seven in March of 1975. Shep and The Limelights earnings shows a total of $22,400, and the first accounting to the Bit Seven was October 1, 1965.

Then the addition to those two artists, there are eight others, making up the difference of approximately $3500.

THE COURT: Would you go over that again? I just do not take that.

THE WITNESS: Yes, of course. The different? After Shep and the Limelights.

Q Start before that.

THE COURT: I don't have any notes except I have -- there was an original recording some time before 1965, then GErmaine Jackson recorded the song in 1972 or 1973. Thereafter substantial earnings and so forth. So I am not familiar with all the names you are mentioning.

THE WITNESS: Well, Germaine Jackson, the first accounting for the Germaine Jackson recording was received on March 13, 1973, and thetotal Germain Jackson earnings was $24,100.

End 5A

THE COURT: Total of the 50,000.

THE WITNESS: Yes.

THE COURT: You give me the figure again.

THE WITNESS: 50.200.

THE COURT: No, for Germayne Jackson.

THE WITNESS: I'm sorry it was 24,100. The only other artist of any substance is Shep And The Limelights. The total earnings of which was $22,400, and the first accounting received by Big Seven was October 1, 1965.

Q With respects to Shep And The Limelights?

A With respect to Shep And The Limelights.

THE COURT: The first Germayne Jackson would have been 1973?

THE WITNESS: Yes, your Honor.

THE COURT: And This Shep And The Limelights thing started what, 1965?

THE WITNESS: Yes.

Q So that the 22,000 --

THE COURT: I hadn't heard anything about Shep And The Limelights. I thought we were arguing that Germayne Jackson produced some substantial increase in earnings. What were you arguing about this, Mr. Schurtman?

MR. SCHURTMAN: Shep And The Limelights were back

in 1961 according to my notes, and then --

THE COURT: I thought that you were trying to tell me that the recording of Germayne Jackson led to cover records. That is the whole point.

MR. SCHURTMAN: Yes.

THE COURT: What cover records did it lead to and how much earnings?

MR. SCHURTMAN: It led to cover records beginning in 1973 and according to my notes, domestic earnings were some $31,000.

THE COURT: In what period?

MR. SCHURTMAN: Beginning in 1973.

THE COURT: To the present?

MR. SCHURTMAN: To the present. $31,000.

MR. BERGEN: And how much of that was for Germayne Jackson?

THE WITNESS: I don't know whether he got $31,000.

THE COURT: I don't think it could be.

MR. SCHURTMAN: Beginning in June, 1973. It includes Germayne Jackson.

THE COURT: The figures he gives me, he has got Germayne Jackson $24,100, Shep And The Limilights $22,400. Maybe we can just look at the exhibit.

MR. SCHURTMAN: Shep And The Limelights was back in 1961.

THE WITNESS: That shows earnings throughout. That is the point, sir. It earned money throughout the period but as far as new recordings are concerned, which I understand was the purpose of deducing these records, there is an artist called "Kings Road".

THE COURT: After Germayne Jackson?

THE WITNESS: After Germayne Jackson.

THE COURT: What were the earnings other than Germayne Jackson and Shep And The Limelights?

THE WITNESS: Yes. A group or an individual, I don't know, called Kings Road for $860, a Gene Chandler for $66.

THE COURT: Chandler.

THE WITNESS: C-h-a-n-d-l-e-r. And on this work sheet, those are the only new artists subsequent to Germayne Jackson.

THE COURT: The cover record earnings, I mean this is ridiculous.

MR. SCHURTMAN: Your Honor, you see there is some confusion here. You seem to assume that cover records would only be records by other artists following Germayne Jackson or John Lennon or whatever hit artist.

THE COURT: I have heard that defined that way about 15 times.

MR. SCHURTMAN: Well, I submit to you that the record does not define it that way. What the record says is that the original recording of the song is the original and anything that follows is a cover record.

Now, when an artist like Gerr-yne Jackson records the song, that in and of itself is a cover record.

THE COURT: Well, of course. Look, I don't give a rap about a technical definition.

MR. SCHURTMAN: Right.

THE COURT: I only care about the value in some form or another. I care about monetary value imparted to a copyright. Now we were trying to look at two things. You have presented an estimate of the loss of mechanical royalties.

MR. SCHURTMAN: Up to date.

THE COURT: Alleged to have been suffered.

MR. SCHURTMAN: To date.

THE COURT: With respect to John Lennon's recording of the song.

MR. SCHURTMAN: Mechanical royalties to date, your Honor.

THE COURT: Fine. We can have it to date, we

could have it estimated in the future. But there was, as I understand it, and if you want to drop this out, it will certainly ease my burden, I understood that there was some slight argument that the recording by John Lennon would lead to other artists recording it.

Now, do you drop that contention?

MR. SCHURTMAN: No, but that is only --

THE COURT: You have massive testimony about it.

MR. SCHURTMAN: That is only half the argument, your Honor, and I think that is where the confusion lies.

THE COURT: It is not confusion. But the point is, that we have now isolated apparently or we are beginning to isolate the so-called other artists'cover records from whatever might accrue from the big artist him or hers.

MR. SCHURTMAN: Right.

THE COURT: And as far as the other artists are concerned, we are dealing apparently on these exhibits of yours, in peanuts.

MR. SCHURTMAN: No, in one case, well in this case --

THE COURT: So where does it get you on the argument about the other artists.

MR. BERGEN: That is precisely the point that you picked up last week, your Honor, that you had to separate these figures from the Lennon recording and recordings after the Santana recording and recordings after, the Germayne Jackson recordings and the recordings after it and that is what we are doing here.

MR. SCHURTMAN: I agree that this particular exhibit shows that with respect to other artists, to use your Honor's term, it is peanuts.

THE COURT: Where are some of the ones of substance?

MR. SCHURTMAN: One of the ones of substance would be the one that Mr. Bienstock introduced.

THE COURT: Let's get that.

MR. BERGEN: I want to go through the rest of these. These are their examples. These are the ones that they picked out of 20,000 songs.

MR. SCHURTMAN: Your Honor, please bear with me for one moment because I think that maybe I have contributed to the confusion that your Honor may have misunderstood part of what I said. Now let me state it once more. We claim three elements. One, the mechanical royalities to date. That is a matter of calculation. Element number two are the future royalties to be earned by an

artist, to be generated by an artist like Lennon either on the same recording or on subsequent rereleases.

MR. BERGEN: But on the same recording is the duplication, your Honor.

MR. SCHURTMAN: There is no duplication, your Honor, we are talking about future earnings.

THE COURT: There is no question that you are entitled to prove that. But where is the proof on that point, future earnings of Lennon.

MR. SCHURTMAN: The proof is that when an artist like Santana or Germayne Jackson records a song, it generates future earnings not only as to other artists which may or may not be peanuts depending upon what the particular song shows, but that it also generates his own future earnings.

THE COURT: Mr. Schurtman, that is so obvious, it is a matter of getting a number. Where is it in this record, we will wait onthat, but in principle, I have no disagreement with you at all. It is just a matter of getting a number. Okay.

Q Mr. Strauss, staying with this Exhibit EO, turning to the song entitled "Maybe" -- may I have this marked as Exhibit EP.

(Defendant's Exhibit EP marked for identification.)

Q I would like to move into evidence, your Honor, Defendant's Exhibit EO.

THE COURT: Yes, I will receive it, and we already received EN.

MR. BERGEN: That's correct.

XXX (Defendant's Exhibit EO received in evidence.)

Q Mr. Strauss, I show you Defendant's Exhibit EP for identification, which is the analysis of earnings by artist for Maybe and ask you to do the same thing with respect to that.

A Yes.

Q And the corresponding document which is Plaintiff's Exhibit 203.

A 203 shows gross domestic mechanicals of $48,600 of which Exhibit EP analyzes $45,600. Of that amount Janis Joplin, whose recording was first released in the six months ended June '70, earned $23,800. Subsequent cover records -- there are four listed here. Excuse me, there are three listed here. One is called the Third Degree. It shows earnings of $5,000.

Another one is called Dave -- I can't make it out.

MR. BERGEN: Do you know what that is, Edmunds? It looks like Dave Edmunds.

MR. ZUCKER: That's what it shows.

A It shows earnings of 25.

THE COURT: We had the Janis Joplin and that earned $23,000.

THE WITNESS: 23,800.

THE COURT: What other recordings?

THE WITNESS: There was subsequent to that the Three Degrees.

THE COURT: And that earned what?

THE WITNESS: What I said is a Roulette artist, it earned $5,000.

THE COURT: Did the other recordings earn the difference between $23,800 and 45,600?

THE WITNESS: Recordings prior to Janis did.

THE COURT: What about recordings after that?

THE WITNESS: I was enumerating, there is the Three Degrees for $5,000, there is Dave Edmunds for $25 and a Sonny Stitt earned $5.

MR. BERGEN: I offer EP in evidence, your Honor.

THE COURT: Received.

XXX (Defendant's Exhibit EP received in evidence.)

Q Turning to the last song, Oye Como Va, may we have this marked as EQ.

XXX (Defendant's Exhibit EQ marked for identification.)

Q Mr. Strauss, I show you a document that has been marked Defendant's Exhibit EQ for identification, the analysis of earnings by artist for Oye Como Va and ask you to use the corresponding Exhibit Plaintiff's 201 and do the same thing.

A Yes. Exhibit 201 shows gross domestic royalties of 125,600, of which Exhibit EQ analyzes 122,600. Of that total of 122,600, Santana earned $119,600.

The balance -- of the balance of $3,000, $2700 was earned on recordings made subsequent to the Santana record and that is spread over eight artists, including Jose Feliciano and Percy Faith.

Q Is Jose Feliciano a well known artist?

A Yes.

Q And now about Percy Faith?

A Yes.

MR. BERGEN: I offer EQ in evidence, your Honor.

THE COURT: Received.

XXX (Defendant's Exhibit EQ received in evidence.)

MR. BERGEN: No further questions.

THE COURT: Any further questions, Mr. Schurtman?

MR. SCHURTMAN: Not on this, no.

(Witness excused.)

THE COURT: Anything else at all?

MR. SCHURTMAN: I can't remember whose case it is at this point. Are you finished with your case?

MR. BERGEN: I have some admissions from some depositions that I would like to read in.

MR. SCHURTMAN: Am I still on my case? I don't know. We have been switching back and forth.

THE COURT: I don't think anybody has rested yet.

MR. SCHURTMAN: Your Honor, you, on the point you just asked me about as to where we show earnings, substantial earnings by other artists, I refer you to the song Close to You, Plaintiff's Exhibit 451 and specifically Mr. Beinstock's testimony in response to questions by the court at page 3619 of the transcript.

THE COURT: I remember that.

MR. SCHURTMAN: Where Mr. Beinstock gave you a multiplier of I think four or five.

THE COURT: Yes.

MR. SCHURTMAN: So there you have a situation nwere the other artists earned substantially more than the Carpenters who were the so-called hit artists. We have given you other situations where other artists have earned a lot less, but the only point that I want to emphasize to your Honor is that you can't simply deduct

Lennon's mechanical royalties to date and then say, "Well what else have other artists earned?" When we offer a figure of 179,000 for Oye Como Va, the purpose is to show over a five year period what cover records, both of the same artist, the one we call the hit artist, in this case Santana, and other artists can earn. That was the point.

THE COURT: Let's finish your evidence so we can get the case rested this afternoon. Do you have any further evidence, Mr. Schurtman?

MR. SCHURTMAN: Except for argument, we don't have any further evidence.

THE COURT: The claim now is being made by what entity? The claim we are now trying.

MR. SCHURTMAN: Big Seven.

THE COURT: It is Big Seven's claim.

MR. SCHURTMAN: There is one other point, but that has to do with phase two of this element. We did want to make an offer of proof of Plaintiff's Exhibit 375 which shows the customary rates charged to Big Seven. May I offer that.

You had at one time indicated that you would not accept proof on that point and I said I would like to make an offer of proof.

THE COURT: Does this relate to damages or specific performance?

MR. SCHURTMAN: Well, specific performance as well. It shows it is less than the 2 cent rate.

THE COURT: Look, I haven't looked at the briefs about the claim for specific performance on phase two, so I would like to get the case rested. I can receive that subject to -- I will just strike it if I find that -- as a matter of law I am not going to entertain any of that phase two, but I think we better get the record complete.

MR. SCHURTMAN: Plaintiff's Exhibit 375 I will offer through Mr. Zucker.

THE COURT: Do you want to take the stand, please, Mr. Zucker.

XX H A R V E Y Z U C K E R, resumed.

XX DIRECT EXAMINATION (Continued)

BY MR. SCHURTMAN:

Q I show you Plaintiff's Exhibit 375 for identification. Did you prepare this?

A Yes, I did.

Q Did you prepare it on the basis of the records of Big Seven?

A Yes, I did.

Q Can you tell the court what it is?

A What I attempted to do was get the average license fee paid by either Big Seven or its affiliates whenever we come out with a package. I have run through approximately 200 licenses on various packages and have averaged out our cost to a little over a penny on the licenses that we paid.

MR. SCHURTMAN: I offer Plaintiff's Exhibit 375 in evidence.

MR. BERGEN: Your Honor, I object to it because it shows -- just because what it shows. It shows the average license fees paid by affiliates. That is hardly evidence of what Big Seven would be charged and would pay to an unaffiliated company, in this case Apple Records. This is one of their own companies that they are hardly dealing at arm's length with.

THE COURT: What do you argue, that this would be a cost?

(Continued on next page.)

MR. SCHURTMAN: No. Phases 2 of the Big Seven settlement said that they should lease the three masters to us at the normal rates paid by Big Seven and they didn't define what normal rates were. I think they used the word normal or something similar. What we are trying to show is that the normal rates paid by Big Seven are less than two cents; that they are slightly over one cent which has a bearing onthe proposals that were subsequently made to us at two cents.

Q Now, can you explain what the affiliates are in this case and how that works?

A Sure. Big Seven itself does not license out songs to put into various compilation albums. What happens is either Roulette Special Products, which is a division of our companies, or Adam VIII would license out from these various companies the songs that are to be included in the compilation packages.

Q When you say license out, you mean lease masters from other companies?

A That is correct.

Q These are leases from non-affiliated companies?

A These are all from non-affiliates. These are all from outside companies.

Q So these are all arms' length dealings?

A Every one.

Q Between affiliates of Big Seven on the one hand --

THE COURT: I will take it. I am not at all sure I will get to this, but I want it complete, so I will take it.

xxx (Plaintiffs' Exhibit 375 was received in evidence.)

THE COURT: All right, anything else?

You may step down.

(Witness excused.)

THE COURT: Do you rest, Mr. Schurtman?

MR. SCHURTMAN: On Big Seven's claim, yes.

THE COURT: Mr. Bergen?

MR. BERGEN: Your Honor, I just have some admissions I would like to read for the record.

THE COURT: All right, surely.

MR. BERGEN: First I would like to read from Mr. Cahl's testimony in his deposition, page 25:

"Q Did Mr. Levy say how he had been damaged by this violation of the contract?

"A Well, damaged in the way of dollars. Damaged in the way of the copyrights not being recorded which would enhance the copyrights and you can't put numbers on

these things as to how much."

Then at page 195 of Mr. Cahl's deposition he testified:

"Q You just said the recording of the three copyrights meant an awful lot of money to Big Seven. How much?

"A I haven't the slightest idea.

"Q Is there any way of calculating that amount of money?

"A From a John Lennon recording an awful lot. I couldn't come to figures."

Then in Mr. Levy's testimony at page 48 at his deposition:

"Q You testified, I believe, Mr. Levy , that someone sent word to you that Mr. Lennon liked two of the songs which had been sent to him and that he intended to record them on his next album. I am now asking you who sent that information.

"A Harold Seider told me that there were a couple of songs that were recorded for his next albu m.

"Q Tha t were recorded?

"A That were recorded, yes. They were recorded for his next album.

"Q Or they were going to be recorded?

"A Were recorded. They were having great difficulty in getting the tapes of the studio sessions where -- Phil was crazy. A gun went off in the studio while they were recording. They had all kinds of problems getting the tapes and they had quite a bit of problems there. They were recorded. The record will show that later on Y ou Can't Catch Me and Angel Baby were recorded during the Spector sessions."

Again in Mr. Levy's deposition testimony, page 53:

"Q He had already reported them for what album? Again referring to these songs.

"A For the Rock and Roll albu m. The Phil Spector Rock and Roll album that was being recorded."

Page 58 to the top of 59.

"Q Did you know that Mr. Lennon's Rock and Roll album was originally planned for release prior to the release of Walls and Bridges?

"A Yes."

Finally, at page 69 and the continuing over to 70:

"Q Do you recall whether this was a telephone call or a meeting in person?

"A I couldn't be specific really. I know there

was some discussion of it a few months after this here, but I couldn't be very specific.

"Q Do you recall the substance or the purport of that conversation?

"A That they were -- that they were recording, they were doing it with Phil Spector. It was a great album and it was going to be great.

"Q Did he at that time mention that you mgiht have with the recording --

"A I don't follow you by connection. It would be three of my songs in the recording, that was still the original agreement that was made in the Federal Court."

The last item I would like to point out is from Mr. Levy's direct testimony in this case at page 116.

"Q In what way did you expect to earn many hundreds of thousands of dollars?

"A We would have received mechanical royalties on every record sold. It would have enhanced the sheet music prospect of selling much more sheet music on the songs. Performance moneys around the world from all the various performance rights societies. Also when you get an artist of the stature of John Lennon recording a song, it gets exposed throughout the world. IN a year or six months later it is inevitably that other artists start recording the song."

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That is it, your Honor.

THE COURT: You rest?

MR. BERGEN: Yes.

THE COURT: All right.

MR. SCHURTMAN: May I direct your Honor's attention to the following portions of the first trial. That is what Mr.Bergen just did at the end there.

THE COURT: He read -- look, this isn't new evidence, is it?

MR. SCHURTMAN: No, not any more than he read at the end.

THE COURT: He read some depositions.

MR. SCHURTMAN: He read something from the trial.

MR. BERGEN: The last thing I read from the first trial.

MR. SCHURTMAN: I will give you the page reference and simply t ell you what they are.

THE COURT: All right.

MR. SCHURTMAN: 696 to 697, Lennon admitted that the Spector tapes were returned before he recorded and released Walls and Bridges.

THE COURT: What is the transcript page?

MR. SCHURTMAN: 696 to 697.

THE COURT: Just give me the page references.

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MR. SCHURTMAN: 1180 to 1187 is where you questioned Seider about whyLennon didn't comply with the '73 settlement. 1180 to 1187 --

THE COURT: We have really studied those things. I have got 1180 to 1187. What else?

MR. SCHURTMAN: 2138, Seider's admission that the '73 settlement was still in effect and 919, Lennon's testimony that he wanted to include Angel Baby because it belonged to Morris.

1294 to 1296, Seider's testimony that it would be all right to drop Angel BAby. Lennon at 919, when he jumped all around the cutting room saying , Great, I can drop Angel Baby from the Rock and Roll album..

Finally page 1871, where your Honor stated that two recordings of Ya Ya would not take the settlement agreeme nt.

THE COURT: All right. Thank you. My office will get in touch with you I think after we have gone over this and pulled the statistical material together and we will try to have you come in for some oral argument hopefully next week or whenever it is convenient, but within the very near future. If I need the playing of the music, I will let you know.

MR. SCHURTMAN: Your Honor, may I just raise

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three other points?

THE COURT: What?

MR. SCHURTMAN: You had asked us about 1AF of M. deductions?

THE COURT: R ight.

MR. SCHURTMAN: Mr. Zucker is prepared to explain the deduction of AF of M.

MR. BERGEN: We argued it this morning and your Honor closed the record.

MR. SCHURTMAN: That was on Canadian.

MR. BERGEN: Your Honor closed the record on the first part --

THE COURT: I will tell you what, I kept some people in a criminal thing sitting for 40 minutes, and I just can't go forward any more.

MR. SCHURTMAN: Let me just give you this. There is the letter I sent you about the Beach Boys album, that in fact the pricing was wrong and we could make that part of the Rule 59 motion if you would prefer, and finally I am still waiting for that David Marsh review.

MR. BERGEN: I spoke to Mr. Marsh. He checked all his files. He does not have a review.

THE COURT: I will see what we need to do on those other points. Thank you very much.

BIG SEVEN MUSIC CORPORATION et al.

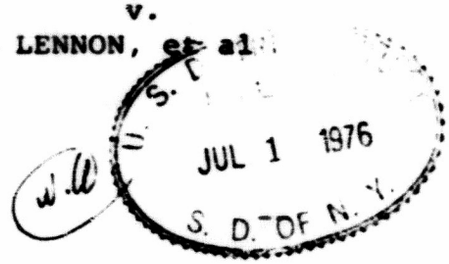
v.

JOHN LENNON, et al.

75 Civ 1116. (T.P.G.)

Judge Griesa

May 28, 1976



THE COURT: I thought I'd give you the opportunity to pull together the evidence, and I have some questions to ask. Why don't you lead off, Mr. Kanzer.

MR. KANZER: May it please the Court, Big Seven claims that John Lennon breached the terms of the October, 1973, agreement, which was, of course, a stipulation entered into in open court before this very court in connection with the come together, You Can't Catch Me copyright infringement action.

THE COURT: Mr. Kanzer, I don't mean that there isn't disagreement on these issues, but I think I have fairly well in mind the positions of the parties on whether there was a breach. And I would like to say that tentatively -- I'll certainly hear from Mr. Bergen to the contrary, but I would tend to think there was a breach of what they will call phase 1, but I want to hear -- that will be a little bit of a burden on Mr. Bergen to overcome, but I don't need to hear from you on that, Mr. Kanzer. I think that the -- I would tend to think that there was a breach of the first phase in that Walls and Bridges was the

next album in the contemplation of the settlement, and that there was only one song instead of three.

Just taking that, I would like to get on to the question of damages, because that is what concerns me more than anything as far as your side of the picture now.

MR. KANZER: Does your Honor want to hear at all about our position on part 2 of the settlement? I know that your Honor has ruled that you don't want to hear damages -- that is, didn't allow it, but we do have the side question of whether there should be specific performance and --

THE COURT: All right. I'd like to hear on that.

MR. KANZER: Would you like to hear the --

THE COURT: Let's keep that other in mind and take the damages first.

MR. KANZER: Before I address myself to the specific computation of damages, I do want to stress that here we have a situation very different from that which pertained earlier in the trial where there were questions as to causation, questions as to contributing factors. Here I want to emphasize that all the damages which are claimed by plaintiff Big Seven are a direct consequence of the activities of John Lennon. It was John Lennon's failure to include a third Big Seven song that is a source of every

damage, and there were no intervening or contributing factors that influenced those damages, it is solely a result of his activities and failure --

THE COURT: Let's pull together your theory, and let's take the theory of lost mechanical royalties first.

MR. KANZER: Fine. The first portion of lost mechanical royalties is, of course, the domestic royalties, and there what we claim is two cents per recording sold on the Walls and Bridges album. Since there we are talking about total sales of 4,200 -- 425,000 sold, we are talking about $8,500.

One of the issues that has come up is whether we are entitled to claim the full 8,500 or only that amount less the writer's fee.

THE COURT: Let me back up.

MR. KANZER: Surely.

THE COURT: You start with the 425,000 units sold of Walls and Bridges. What is that, is that worldwide?

MR. KANZER: That is domestic sales.

What we say thee is we would be entitled to two cents per record sold, which would come to$8,500. There the only question --

THE COURT: You mean two cents --

MR. KANZER: The mechanical royalty that we

would be entitled to --

THE COURT: You are taking the two cents times 420 -- the two cents times the number of sings involved.

MR. KANZER: What I am saying is the amount we didn't receive-- in other words, what we are saying is we were entitled originally to six cents per record, and we admit that Ya Ya gave us two cents and that You Can't Catch Me gave us two cents on the Rock & Roll album.

We waived the right, as I understand it from reading the transcript, and since your Honor knows I was not here at the time, to claim damages for the lost 100,000 sales, or the allegedly lost hundred thousand --

THE COURT: I don't know that you waived it, but --

MR. KANZER: I thought that Mr. Schurtman took the position we were not making a claim for that.

THE COURT: I think I rejected -- anyway the record shows, and I don't think it is before me and whether Mr. Schurtman waived or I told him I wouldn't consider it, one way or the other, it isn't before us today.

MR. KANZER: I think the basic point is that we were entitled to three songs and to the mechanical royalties from three songs. We received mechanical royalties from two songs. That leaves a third one we didn't receive it from.

Whether it would have been Angel Baby or some other record, or some other song, it still is a missing one --

THE COURT: Is this right, according to your theory I can take the -- as a starting point before any credits for Rock & Roll or anything like that, I start with it today, according to your theory, that there were-- that there should have been three songs on Walls and Bridges and there was only one song, right?

MR. KANZER: Right.

THE COURT: And therefore you claim to have been deprived of the royalties on two songs, and that would be 425,000 times four cents.

MR. KANZER: That would be correct. However, since we didn't make a claim for the difference of two cents times the number of albums by which Walls and Bridges exceeded the sales of Rock & Roll domestically, it really comes down to just about the two cents times the-- for the one song.

In other words, your Honor, you may remember Mr. Zucker originally, in I believe it was Plaintiffs' Exhibit 301, had a calculation that showed the difference between the amount that would have been received on the two albums, and I came up with a total of $10,160 as the calculation if you were to use it that way.

I think tht what we ultimately said is since we weren't claiming the losses of two cents for the number of albums that -- I guess it would be the difference in sales between Walls and Bridges and Rock & Roll on the second Big Seven song, because the court found that we had in effect on the sales of Rock & Roll, and that that kept it from being less than the sales of Walls & Bridges--

THE COURT: I think we are getting to the same point, but for some reason we are not getting it the same way.

Would you accept this as representing your theory: there were two songs you claim that should have been on Walls and Bridges that weren't, right?

MR. KANZER: Correct.

THE COURT: Now, if you just take that and you go no farther, you would be deprived of --

MR, KANZER: $17,000.

THE COURT: -- of $17,000 --

MR. KANZER: For domestic mechanical royalties.

THE COURT: All right. Now, you are willing to reduce that by the royalties earned from the Rock & Roll album on the song You Can't Catch Me, is that right?

MR. KANZER: That's correct.

THE COURT: Therefore, you take two cents times

342,000, right?

MR. KANZER: Right.

THE COURT: -- and that gets you --

MR. KANZER: That of course would be $6,840 -- $6,840, correct. The difference would be $1,660 --well, you would have then 8,500 plus 6,000 -- you would have 8,500 plus $1,660, which would be a total of $10,160; however, I do think that we did take the position at trial that we weren't going to make a claim for the two cents times-- for in effect the $1,660 as per the court's finding but for the activities of my clients the Rock & Roll package would have sold at least as many as the Walls and Bridges album , so I think we are left at that point with mechanical royalties of $8,500, your Honor -- as the missing mechanical royalties, domestic, of course.

THE COURT: This is not I'm sure worth spending less time over, but I don't recall the point you just made, and I think you are going to have to help me out.

Do you or do you not claim the $1,660? If you do you do if you don't you don't.

MR. KANZER: I think, your Honor, to be consistent, since your Honor did take the position earlier in the case when Mr. Straus was making arguments about that hundred thousand sales that you would not consider

the argument, that they should get credit for all three-- for the hundred thousand and both of those two, in other words, Mr. Straus, as you may recall, took the position that in fact the total royalties that should be credited to us on the Rock & Roll package was calculated on the basis of 442,000 rather than 342,000 --

THE COURT: That's right. He suggested that -- in other words, consistent with my earlier decision, we should assume that there had been no interference and that there would have been the sales of Rock & Roll, but I said would have occurred but for Levy's activities, and then we should assume that the -- that You Can't Catch Me, for instance, was sold 442,000 times, of whatever it is, on the Rock & Roll album, and I told him I would not do that. Isn't that basically it?

MR.KANZER: That was my understanding.

MR. BERGEN: That's basically what you said, your Honor, yes.

MR. KANZER: Maybe I missed something, but I thought --

THE COURT: Do you have any disagreement with that? I don't want to retread that thing but --

MR. BERGEN: I disagree because we still feel that there -- that some credit should be given because Mr.

Levy got the benefit of those hundred thousand albums because--

THE COURT: You were putting this -- it was your witness--

MR. BERGEN: It was Mr. Straus who testified about this. It is our position that since the Capitol damages were net, in other words, when Mr. Posner calculated the Capitol damages he deducted royalties that would be paid on that hundred thousand that Mr. Levy has already gotten the benefit of in terms of lower damages from Capitol, and therefore he is getting the benefit of it again here by those four -- that four cents on the extra hundred thousand, and not being reduced -- not being used to reduce whatever the damages might be on this claim. I hadn't articulated it quite that way before, but that's basically the way it is.

THE COURT: I just couldn't grasp it at the trial, and I sort of figured that anything I couldn't grasp I wouldn't award damages about.

MR. BERGEN: That is perfectly understandable.

THE COURT: But it worries me that I don't even understand it. You say that again.

MR. BERGEN: When Mr. Posner calculated what Capitol's damages were, those damages -- and we have talked

about them before -- were a net figure; in other words, it wasn't including any of the overhead or royalties that would have been paid on those hundred thousand, in other words, it is just what Capitol's profit would have been.

So since Mr. Levy was not taxed with a gross figure which would have included four cents a record for the royalty that would have been paid to him, he in effect got the benefit of lower damages, and now we --

THE COURT: Okay, in other words, when I awarded damages on the Capitol counterclaims, I was giving really what I considered net profits to Capitol.

MR. BERGEN: That's correct.

THE COURT: After all expenses, including any royalties that would have been paid on all the songs, to Levy and everybody else, and I was figuring -- I was assuming that those royalties would have been paid on the extra hundred thousand records, right?

MR. BERGEN: That's correct.

THE COURT: Okay. Where do you go from there?

MR. BERGEN: We go from there that therefore Mr. Levy's damages would have been $4,000 more if you had figured it on a gross figure because the damages would have been calculated on the basis of two cents for each song on

the album.

Since he was not taxed with those damages, any of the royalties, he shouldn't get the benefit again of those -- of that $4,000, four cents for the two Levy songs, two Big Seven songs, times a hundred thousand albums. In other words, he's already received the benefit of the hundred thousand additional sales that your Honor has found would have happened, but not for his tortious interference or intervention.

Therefore, it was our position, and I had not articulated it quite this way before, but it was our position that when you figured out in Mr. Straus' Exhibit DX what the damages were, that $4,000 was something that should be deducted from whatever calculation you arrived at that Mr. Levy now says he should have gotten, two cents on Walls and Bridges and two cents for the fact that it was only one song--

THE COURT: And the 4,000 is four cents --

MR. BERGEN: Times a hundred thousand, a hundred thousand albums that your Honor found Rock & Roll would have sold but for the interference of Levy and Adam VIII.

THE COURT: Let me try and follow that through again because I still don't get it.

I was certainly figuring it on a net profit basis,

and I was assuming the payment of these expenses, including these royalties.

Now, that would be, as I found, Capitol's damages, that is the amount of money that it was out by not being able to sell these hundred thousand extra records.

MR. BERGEN: That's correct.

THE COURT: You turn now to Levy's damage. If Mr. Kanzer is right -- if Levy is right that there was a breach of contract by not having these three songs on Walls and Bridges, well, if you take it just one step at a time, there was, of course, one song on Walls and Bridges but there weren't the other two songs. So we get-- we multiply four cents by 425,000 and get 17,000.

Levy is apparently willing to give credit to Lennon for amounts that were recouped, so to speak, by having the songs on Rock & Roll.

I think what I was thinking at the trial, and it may be too simple, but I was just thinking that the breach, really, was in not having the songs on Walls and Bridges, and one way to look at it is that there would be no recoupment if you have it on another album. That is a gratuitous act on the part of Levy, if he puts it on another album, well, that -- not Levy, on the part of Lennon, if Lennon puts -- he can put ten songs of Morris

Levy on Rock & Roll but that doesn't cure the breach of the contract on Walls and Bridges, but we are past that, and that would be too harsh a position because the two things were too closely related and we don't need to go into that.

Anyway, Levy is willing, I think properly, to give Lennon credit for Lennon's putting at least the You Can't Catch Me on Rock & Roll. We will come to the second Ya Ya in just a minute.

Okay. Now, I don't know quite how to explain to you in terms that you could help me out and explain back to me, but I don't see why that credit should be anything but actual royalties, royalties actually earned on Rock & Roll -- I guess we will have to leave it at that. I will think about that. I can't even ask you any questions--

MR. BERGEN: I guess the only way I can explain it a little better is by saying that since Levy has gotten the benefit of that $4,000 by not having it included in the damages awarded to Capitol, then he shouldn't be given the benefit of it again.

THE COURT: I'll think about that. I won't take up any more time on that.

MR. KANZER: Your Honor, may I reply even briefly to what Mr. Bergen has just said?

THE COURT: Surely.

MR. KANZER: I think we are in a situation where Mr. Bergen is confusing two different things. It is true that Mr. Levy was not asked to pay damages on a portion of the total price that Capitol would have had as employees for an additional hundred thousand sales because you looked quite rightly to what Capitol would end up with, and if Capitol had an expense that it was saving as a consequence of not having to pay out the hundred thousand, well, that of course shouldn't be awarded as damages. But Levy never got the royalties, and I think that is the gap in Mr. Bergen's logic.

THE COURT: I would look at it later.

Let's get back to that 1,660, You see, the theory I had, and maybe I will change it on further thought, but I don't think I can change it right now, is that if there is to be credit against Levy's claim by virtue of the fact that Lennon recorded something on Rock & Roll, then it should be just that. In other words, you deduct the amount -- you deduct from shat should have been earned on Walls and Bridges what was earned on the Rock & Roll album, and that would be, you deduct the 6,840 and you end up the way you have ended up on 301. That would be my theory and I will consider that further.

Okay. Now, I take it that you -- that Levy's

position is that the only credit to be given for Rock & Roll on this particular claim is the credit for the recording of You can't Catch Me.

MR. KANZER: That is quite correct.

THE COURT: You do not contend that there should be any credit for the second recording of Ya Ya?

MR. KANZER: Quite the contrary, your Honor.

THE COURT: All right. I want to know your position on that, Mr. Bergen.

MR. BERGEN: Well, if they are going to give credit for You Can't Catch Me I don't see how you can just ignore the fact that Mr. Levy did earn royalties of two cents on the version of Ya Ya, which --

THE COURT: And it is a gratuitous act. You were supposed to record three different songs, you record two songs twice, that may be nice, it may be -- it may put mone in Mr. Lennon's pocket --

MR. BERGEN: Mr. Levy's pocket, but -- it puts money in Mr. Levy's pocket, but not according to the contract. In other words, the contract called for three different songs.

MR. BERGEN: That is a question we are not sure that we agree with either because, you know, the contract didn't say three different songs. We think there is

evidence in the record, Mr. Graham's testimony, that what Mr. Levy was really bargaining for was two cents on three songs, and Mr. Graham specifically said in answer to my questions, and it was never controverted by Mr. Levy, there was never any mention about enhancement of copyright or enhancement of the value of the copyright of these songs. What Mr. Levy was looking for was two cents a song and what he wanted was $60,000, becasue Mr. Graham said to him that --

THE COURT: Three songs isn't one song recorded three times or two songs recorded -- one song recorded twice and another song -- I wouldn't interpret three songs as anything but three different songs.

MR. BERGEN: The one point I'd like to make about Exhibit 301 is even accepting those figures, there still isn't any deduction on there for the writer's share of these royalties.

THE COURT: I will come to that definitely.

MR. KANZER: I assume your Honor does not want me to comment further on the argument that Mr. Bergen has just made, because I agree with your Honor.

THE COURT: No. We will go on.

Let's go for the foreign mechanical royalties.

MR. KANZER: On the foreign mechanical royalties there were alternative calculations by Mr. Zucker in the form of Plaintiffs' Exhibits 303-B and 302-A. He calculated that Walls and Bridges would have generated -- that is, had the additional sum on Walls and Bridges, as the contract required, it would have generated $19,893 in additional mechanical royalties, and that is our claim.

Of course, had it appeared on Rock & Roll it would have been $16,872 additional. But we are claiming the 19,893.

THE COURT: Where is the 19,893?

MR. KANZER: That I believe is the calculation he came up in his Exhibit 301, which was based on his calculations of -- I guess it is 302-B which shows how he generated this. What he does is he lists by country each of the countries in which Walls and Bridges had sales, he lists what the sales of Walls and Bridges in each of those countries was, he takes a royalty rate for each of those countries and does the mathematics and comes out with $19,893.

THE COURT: What is the difference -- what is your exhibit, Mr. Bergen?

MR. BERGEN: Yes, your Honor.

THE COURT: What is your position on the foreign

mechanical royalties?

MR. BERGEN: Our position on the foreign mechanical royalties is again, one, they didn't deduct the writer's share--

THE COURT: Let's hold that for just a minute.

MR. BERGEN: And two they didn't allow for the fact that in some of the instances these foreign subsidiaries, these subsidiaries of the publishing company keep the great bulk of the money and that Big Seven really winds up with maybe only a quarter of, for example, a dollar, because the foreign publishing companies in some instances keep 50 percent of the dollar, remit 50 percent to Big Seven and Big Seven in turn remits half of that to the writer.

Since the claim is being asserted here on behalf of Big Seven, and it is our position that you can't award the damages to -- damages that really may have been suffered by these foreign subsidiaries or by the writers. There is also, I believe, Mr. Straus went through Exhibit 302-B in detail in his testimony and pointed out that there were a number of defects in that calculation that would have reduced the 19,000 figure substantially.

Do you have your copy of DX-1, or a copy of it? What I want to do is underberth the difference in your positions. I think I understand it on the domestic

side but I'm not sure I understand it on the foreign side at all.

I don't quite get this DX-1 exhibit.

MR. BERGEN: May I just look at it for a minute, your Honor?

THE COURT: Help yourself.

(Pause)

MR. BERGEN: Again, what Mr. Straus has done is that he has given credit on this exhibit for the fact that there were two songs on Rock & Roll and then he goes through the figures that are given by Mr. Zucker and makes adjustments for that, he makes adjustmens for the packaging allowance, which he testified is something that is deducted from the royalties overseas. He deducted also the foreign publisher's share, which I just mentioned and the writer's share of the balance, when you finally -- when Big Seven is finally remitted whatever it is supposed to receive from the foreign publishers, then you have to cut that in half because half of that goes to the writer as his share.

THE COURT: Let me just for a minute get this. What is 303-A, Mr. Kanzer? I've got 302-B and 303-A. They are both about foreign mechanical royalties. But I don't understand what the difference is. One has a figure of

$19,893 and the other has 16,782.

MR. KANZER: 302-B was based, your Honor, on what additional royalties would have been had the third song been included on the Walls and Bridges album.

303-A is what income would have been had it been included on the Rock & Roll album.

Mr. Zucker gave you the alternative calculations so that were your Honor to have decided that the proper measure was Rock & Roll's sales ratio of Walls and Bridges you have the figures, but our position is that 302-B should be the basis for the court's decision because, as the court noted earlier in this argument, the contract or the stipulation called for the recording to be on Walls & Bridges and not on Rock & Roll, so really I think you need only concern yourself with 302-B.

THE COURT: 302-B is --

MR. KANZER: Zucker's calculation of what loss in revenue was in terms of foreign mechanical royalties becasue Walls and Bridges didn't include a third Big Seven song.

THE COURT: So it is the --

MR. KANZER: If your Honor --

THE COURT: Excuse me.

MR. KANZER: May I make a suggestion?

THE COURT: Okay.

MR. KANZER: If your Honor is going to be allowing us the 1,660, I think consistently what your Honor should be doing is also -- in addition to awarding 19,893, award also the difference between 19,893 and 16,872, because the 16,872 was the amount that we received for You Can't Catch Me and if your Honor is going to allow the difference between the sales of Walls and Bridges and Rock & Roll to be considered, we'd be entitled to the difference thereto.

THE COURT: The 16,893 is --

MR. KANZER: 872.

THE COURT: Is the royalty what, the foreign royalty on one song?

MR. KANZER: On Rock & Rock, exactly.

THE COURT: No, on Walls & Bridges -- on Rock & Roll. I used the wrong -- let me start over.

The 18,893 is the royalties on -- the royalties on one song on Walls & Bridges, right?

MR. KANZER: Correct.

THE COURT: And so you are saying -- according to your argument, and your argument is the foreign --

MR. KANZER: That is foreign --

THE COURT -- the mechanical royalty is that you

claim would be received by Levy on foreign sales of one song--right, on Walls and Bridges.

You say that --

MR. KANZER: We would also --

THE COURT: In addition to that --

MR. KANZER: -- be entitled to the difference, the amount by which that 19,893 exceeds the amount that we--get credit for on Walls and Bridges for You Can't Catch Me, which would be 16,872, that would be the equivalent of that $1,662 we were referring to earlier today.

THE COURT: Why don't you do it that way? If you were calculating on an identical basis --

MR. KANZER: Then we would double the 19,893, in other words, take the position there would be twice as much because there would be two songs --

THE COURT: And double the 16 --

MR. KANZER: No, not double the 16, because we are only -- all right. No, we would be not doubling the 16. You see, we are not subtracting -- let me start again.

Here is the confusion: the $19,893 on 302-B represents, as I understand it, the royalty that Big Seven would have received had one additional song been on Walls and Bridges.

THE COURT: For foreign sales?

MR. KANZER: Exactly.

THE COURT: Okay.

MR. KANZER: In addition to that, that would be the equivalent -- to go back to the domestic example, of the $8500.

THE COURT: Right.

MR. KANZER: Now, in addition, since your Honor has indicated that you think that on domestic what they should get credit for is two cents times the number of sales of Rock & Roll, that is $6,840 we mentioned before, and that therefore we were entitled, in addition to the 8,500, to the difference between 8,500 and 6,840 for You Can't Catch Me, the same logic would apply here, of course, that, in other words, on You Can't Catch Me we would be entitled to an additional $5,021.

THE COURT: In other words, let's start again. Going through the whole routine on the foreign side. One song, Ya Ya, was as per contract, it was on Walls and Bridges. So we don't worry about that.

MR. KANZER: Exactly.

THE COURT: Second song-- we will call it second song, and it wasn't there either on Walls and Bridges or on the Rock & Roll album, so you take the -- according to your argument, the 19,983 figure, which represents

the royalties on one song foreign sales Walls and Bridges without any deduction or credit, right?

MR. KANZER: Right.

THE COURT: The third song, You Can't Catch Me, was not on Walls and Bridges, but was on Rock & Roll, so you take the foreign royalties for Walls and Bridges of one song, $19,893, and you deduct from it the foreign royalties, one song, Rock & Roll, $16,872, and what is that --

MR. KANZER: All right. Doing it that way, you have then a total of $19,893, plus $3,021 for You Can't Catch Me coming to a grand total of $22,914.

The alternate --

THE COURT: Go through that more slowly.

MR. KANZER: There are two ways of doing it. I think that if we want to be consistent with the way your Honor was looking at the first example, the simpler way of doing it is saying that you have $19,893 per song. If you multiply that times 2, for two songs, you have $39,786 --

THE COURT: Look, you're losing me. Take the 19,893. That is for one song that was not on either album. Then -- what is the difference between --

MR. KANZER: $3,021, your Honor. The difference on You Can't Catch Me would be $3,021.

THE COURT: Let's assume that we start with that

bslt

total of -- what was it?

MR. KANZER: $22,914 for foreign and $10,160 for domestic.

MR. BERGEN: Excuse me. How do you get the $10,160?

MR. KANZER: The 8,500 plus the 1,660.

THE COURT: That's in Exhibit --

MR. KANZER: That was in Exhibit --

THE COURT: -- 301.

How do you deal with these problems that Mr. Bergen and his expert raised, that is, the writers' share, the deductions that are made because amounts are kept in the foreign subsidiaries and aren't paid to any plaintiff here, extra costs about foreign distribution and so forth?

MR. KANZER: Let me first take up the question ofthe foreign subsidiaries' share.

Your Honor, this situation is absolutely identical to the one you had before you earlier in the trial, where you allowed damages to Capitol Records for lost sales of its Canadian subsidiary. At page 3472 of the transcript you allowed $15,600 in damages for lost sales -- lost profits on Canadian sales. It was not the slightest evidence in the record that a single penny of that sum would be remitted --

THE COURT: There wasn't the slightest objection

by you or Mr. Schurtman to the standing of Capitol to recover that amount.

You know, I do know the difference between one corporation and another if anybody will tell me about that problem.

MR. KANZER: Your Honor, we then have the situation --

THE COURT: Did you ever raise it?

MR. KANZER: I don't think it was raised at the time. It will be raised by a 52B motion if necessary.

THE COURT: I don't want to have this thing drag on and on with 52B motions.

MR. KANZER: Your Honor, it is not what I desire either.

THE COURT: Can't you -- I mean, I take it now you are prepared to argue that you do not object to the Canadian subsidiary's claim as long as you can recover for losses for foreign subsidiaries, right?

MR. KANZER: What I am saying, your Honor, is we want to be consistent. If it is going to be allowed in one case it should be allowed in the other.

THE COURT: What's the right way to handle it? I am glad to have consistency, too, but how do you feel it should be handled?

MR. KANZER: Well, I think that technically, as a matter of corporate law, they are separate entities. It was never taken into account throughout this trial until this point that they are separate entities.

I think that in the interests of trying to resolve this matter finally, because all that is going to happen otherwise is the foreign subsidiaries in each case may simply come in and bring an independent cause of action which will get it right back into this Federal Court and have still another Court to deal with this whole thing, and it may even be referred to your Honor and -- given the fact your Honor has a certain degree of experience in this case.

I think that in the interest of resolving this finally, the subsidiaries' claims should just be merged into the parent company's claims.

THE COURT: That's quite a threat. He is going to have the Australian, the Belgium, the Brazilian, the Denmark, the French, the German, and so forth, all come in.

MR. BERGEN: Your Honor, I don't believe that the claim for Canadian sales was made by Capitol. It was for sales for records that were sold by Capitol in Canada the same way as the PX sales, so it is not the same thing.

MR. KANZER: I don't think that is true.

THE COURT: The differentiation was never made.

I assume that Capitol derived the profitf from those sales in Canada. I assumed that --

MR.KANZER: I suspect that at some point Capitol of Canada did pass it on to Capitol of United States.

THE COURT: Are the sales made by Capitol of Canada?

MR. KANZER: Iwas under the impression that they were, they were reproted by Capitol of Canada.

MR. BERGEN: I don't believe they were, your Honor --

THE COURT: I won't get into that. That involves going back over something I am not prepared to go back over this afternoon. Let us stick to the proprieties of your claim. Who is suing, is it actually Big Seven?

MR. KANZER: Big Seven is the plaintiff.

THE COURT: All right.

Now Big Seven, what, does Big Seven have subsidiaries in these other foreign countries?

MR. KANZER: Yes. I gather that what it does is it sets up subsidiaries to actuate the nominal recipients of foreign income and then passes it on to the United States in some proportion.

MR. BERGEN: At page 4034 you specifically asked

Mr. Schurtman on the last day.

"THE COURT: The claim now is being made by what entity, the claim we are now trying?

"MR. SCHURTMAN: Big Seven.

"THE COURT: It is Big Seven's claim."

And a few pages later, page 4038:

"THE COURT: Do you rest, Mr. Schurtman?

"MR. SCHURTMAN: On Big Seven's claim, yes."

What could possibly be clearer than that?

THE COURT: I don't think it is all that technical. As I understand it, those foreign entities aren't permitted to send all this money back, and I thought that that was the thrust of what we were talking about.

MR. KANZER: I don't know that it is true they are not permitted to, your Honor, I think that varies from country to country.

I think that it may be the practice by contract that they retain certain of those funds, and I suspect that that is for tax reasons more than for corporate law matters, your Honor, but that really, I suspect, that what we have is a situation that from the beginning it has been assumed that none was differentiating between Capitol, for example, U.S. Capitol and Capitol Canada --

THE COURT: Please don't bring that up again

because, if I have to, I will go, you know, I will go back and find out -- look, if anybody does make a motion, which I will very much regret because we have had ample opportunity to clarify all of these things here and now -- but if anybody is going to bring this up in some form, I have to go back and find out who was making the sales, what relationships of the entities were and so forth.

Now, I don't know whether there is any analogy in the Capitol Canadian situation to what we are talking about here or not. And I don't think you are prepared to really tell me whether there is an analogy.

MR. KANZER: I think there is an analogy. I am not prepared to discuss the details at this time.

THE COURT: Let us not then get into that.

MR.KANZER: I might just note, your Honor --

THE COURT: Your position-- I am looking again at this Exhibit DX-1, Mr. Bergen.

MR. BERGEN: Yes, sir.

THE COURT: What is your position on this foreign subsidiary deduction? I am not completely clear as to again what this means.

MR. BERGEN: Our position is that they are -- that Big Seven, since it is making the claim, is not entitled to make a claim for that amount of money because it is of another company, a separate entity that is somewhere

across the ocean.

That is set forth on the second page of DX-1, and I believe Mr. --

THE COURT: You take this and see what deduction you are talking about.

MR. BERGEN: The way Mr. Straus got to it, he took approximately $1200 as the foreign publisher's share because that is what he got to as a figure of $3,021 --

THE COURT: What percentage was he deducting?

MR. BERGEN: 50 percent because 50 percent of the royalties are retained by these foreign subsidiaries and if you are talking about a dollar, for example, 50 cents is retained by the foreign suqsidiary then 50 cents is sent to Big Seven and -- and 25 cents of that is then passed on to the writer.

THE COURT: Is that right?

MR. KANZER: Mr. Zucker's testimony was that approximately 50 percent would be retained by the foreign subsidiary.

THE COURT: Say that again.

MR. KANZER: Mr. Zucker's testimony was that approximately 50 percent of the royalties received by the foreign subsidiaries would in fact be retained by foreign subsidiaries. The other 50 percent, he testified, would be

passed on to Big Seven.

MR. BERGEN: And he also testified that 50 percent of that is then passed on to the writer.

THE COURT: Zucker was --

MR. KANZER: Zucker was our accountant, yes. We don't challenge the 50 percent figure.

THE COURT: Okay.

And am I going to assume that in each of the foreign countries listed on Exhibits 302-B and 303-A you were dealing through subsidiaries?

MR. KANZER: Yes.

THE COURT: And on the average 50 percent was retained?

MR. KANZER: Yes.

THE COURT: Okay. And that that would be 50 percent --

MR. KANZER: Of the 22,914.

THE COURT: -- of the 22,000. What do they do with the 50 percent retained?

MR. KANZER: I assume they use it for the purposes of the subsidiary which hopefully generates more money for Big Seven ultimately.

THE COURT: What would be a theory under which Big Seven could actually recover --

MR. KANZER: Big Seven ultimately is getting the use of any money that goes to its subsidiaries. I believe the testimony is that in virtually every case they are wholly owned subsidiaries and underthose circumstances it is --

THE COURT: What do you mean virtually, there are some that aren't?

MR. KANZER: I believe Zucker's testimony was that almost all of them were wholly owned. I don't recall specifically whether he divided which ones were and which ones weren't.

THE COURT: I think he did. Didn't we have an exhibit spelling out who was -- which was wholly owned and which wasn't?

MR. BERGEN: I don't believe there was, your Honor.

THE COURT: You don't think that was gone into in detail?

MR. BERGEN: No.

THE COURT: :iss Jackson points out in the minutes page 3680 Zucker testified that 60 percent --

MR.KANZER: He estimated that approximately 60 percent of all gross royalties earned were retained by Big Seven.

THE COURT: Were retained what?

MR. KANZER: My summary, and I will have to take a look at the actual transcript, says Zucker stated on the average Big Seven retains approximately 60 percent of all gross royalties retained.

THE COURT: I am sorry. Will you repeat that?

MR. KANZER: I am looking at a summary rather than --

THE COURT: Let us get the transcript.

MR. KANZER: Your Honor, as I look at the actual transcript, he is lumping together both the domestic corporation and the foreign subsidiary. In other words, both domestic royalties and foreign royalties when he comes up with the number of 60 percent, an average of 60 percent.

MR. BERGEN: he says "Generally we would keep both in the domestic corporation and in our subsidiaries, approximately 60 percent of the income earned."

THE COURT: Maybe we can come -- let us suppose that I determine as a matter of law that Big Seven can only recover for what I would say its share of the foreign subsidiary earnings was. Is there something in the record that you can agree on as to what that share is?

I am not trying to use "share" in any --

I am trying to embody what we have been talking about in the last few minutes.

Is there a percentage we can agree on? I know you disagree as a matter of law as to whether it should be done, but what is your position, what percentage?

MR. KANZER: I am afriad, your Honor, the answer is that it is not clear in the record because I think that Mr. Zucker did say that when they operate through subsidiaries that they retain 50 percent but I think he also said at page 3680 "In other countries foreign companies would issue licenses themsleves through Big Seven representatives" which I assume he means there that sometimes Big Seven must have gotten the money directly. It is unclear.

THE COURT: I think -- your expert took an average of 50 percent.

MR. BERGEN: That is correct.

THE COURT: Let's go on to -- what about writers share?

MR. KANZER: On the question of writers share. Throughout the damage trial --

THE COURT: Writers share applies to what, gross royalties?

MR. BERGEN: That is correct, your Honor.

THE COURT: So in other words, if I am taking it step by step, I'd start with the gross royalties, I would get all the gross royalties and the domestic side, and I would get -- I would have to pay writers share of those gross royalties?

MR. BERGEN: That is correct, on the domestic.

THE COURT: On the foreign side, the writers share -- does he have to get paid on the foreign side?

MR. BERGEN: That is correct.

MR. KANZER: No. That would be paid by the foreign subsidiary and not by Big Seven, your Honor.

MR. BERGEN: Mr. Zucker testified and so did Mr. Straus that you take off whatever the foreign subsidiary holds, you send it back to the Big Seven and then Big Seven remits it to the writer.

The thing about this is if you are talking about a song, and you give Big Seven the writer's share, Big Seven isn't going to turn around and give that to any writer because it doesn't have a writer to give it to, so you are giving Big Seven a windfall in effect. They are getting some that they are not going to turn over to somebody.

THE COURT: Let us take it a step at a time. Your argument would be that Big Seven, it gets its domestic

gross royalties in, is that correct?

MR. BERGEN: That is correct. It pays off half of that.

THE COURT: Okay. It also gets 50 percent of the foreign royalties in. Now, it's got a group of writers?

MR. BERGEN: That is correct.

THE COURT: And each of the writers get something that totals half of these gross royalties. You are saying that the -- the money that comes in from the foreign subsidiaries to Big Seven here in New York, Big Seven has to take half of that and pay to -- who would they pay it to, to Chuck Berry --

MR. BERGEN: Whoever the writer was on the particular song. On the domestic side they would do the same thing, if they got a dollar royalty, say they got $20,000 in royalties -- in this case, if they got $10,000 -- $10,160 as the domestic loss on the royalties, they would have to pay half of that to a writer.

THE COURT: Just as a matter of curiosity, what would happen on the foreign side with the 50 percent which remains with the foreign subsidiary? Does that subsidiary have to pay the writer?

MR. BERGEN: It is my understanding from the testimony of both Mr. Straus and Mr. Zucker that it stays

there and that it is Big Seven's obligation to pay the writer half of the royalty that it receives.

THE COURT: Because the Big Seven's obligation -- what about that?

MR. KANZER: I am getting confused as to what Mr. Berger is maintaining. If he is saying that Big Seven, to use a simple example, the foreign subsidiary gets a dollar, remits 50 cents to Big Seven, as I understand it Big Seven would pay 25 cents over to the writer. It would not pay -- not give the writer a share of what foreign subsidiary was holding.

MR. BERGEN: That is correct.

MR. KANZER: We agree on that. I agree with the calculation and concept then, but the question now comes up whether or not we in fact would have to pay that royalty to the writer.

First of all, there are two separate questions here, first we have that $3,021 for You Can't Catch Me foreign and $1,660 domestic.

THE COURT: Give me just a minute. I want to write something down.

(Pause.)

THE COURT: It went to the writer's share 50 percent, we would do it this way, as I understand it.

Dealing with the figures that I have developed so far, I have been talking about a 10,160 mechanical royalty lost on the domestic side, I have been talking about a $22,914 total gross royalty on the foreign side, but I have deducted 50 percent of that to take into account the foreign subsidiaries and I got 11,457 royalty paid to Big Seven on the foreign sales.

So I have got a total of Big Seven's gross royalties from these figures of, as follows: 10,160 plus 11,457 for 21,617.

We all agree that if there is to be a writer's share taken out of that it would be 50 percent of that figure. I mean that is your position, Mr. Bergen, right?

MR. BERGEN: That is correct, your Honor.

THE COURT: All right. Now, you contend, however, that it is not proper to take the writer's share out. Why do you do that, Mr. Kanzer?

MR. KANZER: I'd like to divide that into two different groups because I think it will be easier to follow this way. Of that $21,617 one portion of it, which I believe, if my arithmetic holds up is $3,172, whatever, is the portion attributable to You Can't Catch Me.

You remember, we have You Can't Catch Me and we have the unrecorded song.

As to You Can't Catch Me, we have a legal obligation to pay that one-half interest over to Chuck Berry, who is the writer. There is a clearly identified writer and we have to pay it, assuming that we receive the award in damages. So it would certainly not we believe be proper to deduct the writer's share from what we recover because it is a cost just like Capitol had costs that it's going to have to pay that were included.

THE COURT: No, I don't understand that at all. It just doesn't follow, does it?

MR. KANZER: Capitol received money, for example, for overhead because part of the money that it would have received as gross revenues from the sale of this album were deemed to have gone to pay for overhead and the Court allowed that.

Here,your Honor --

THE COURT: I didn't allow that.

MR. KANZER: I think you did, but let's stick to this then. Let's simplify it and just stick to this now --

THE COURT: I allowed additional lost net profit.

MR. KANZER: Yes, and you included in that an amount, I believe that had to go to pay overhead of Capitol. I don't think it is going to be necessary to get into that.

THE COURT: Don't get into that.

MR. KANZER: Let's stick for the moment with this. If Big Seven has a legal obligation, as it definitely does, to pay over from any sums it receives as damages in this case, a portion, namely, the writer's royalty, over to Chuck Berry, because he is clearly identified writer of You Can't Catch Me --

THE COURT: I get your point.

MR. KANZER: -- if we don't receive the portion we have got to pay over to him we don't get anything at all because we will have to pay the entire thing over to him.

MR. BERGEN: There is nothing in the record as to what they are supposed to pay to Chuck Berry.

MR. KANZER: It is in the record and I thought we agreed that we have to pay 50 percent of writer's royalties, and if that is not in the record --

MR. BERGEN: I happen to know that the deal with Chuck Berry is different, that Mr. Berry does not own the entire copyright of that song and I believe there was testimony at Mr. Levy's deposition to this. He doesn't own the entire song. Big Seven owns a chunk of the copyright, the writer's share on You Cant Catch Me.

MR. KANZER: If that is the case, and if Mr. Bergen is correct then I won't argue it, then Big Seven

would be retaining more than 50 percent. What Big Seven is paying out, your Honor, whatever that amount is -- in other words,your Honor, to use simple mathematics again, assume that the total we were talking about for You Can't Catch Me, the total royalties were $1,000. I thought the figure that we would have to pay over to the writer was $500, or one-half of that amount. If, for example, Mr. Bergen is right that we really have a deal with Chuck Berry that we only have to pay him over $250, then we would be retaining 750 and would be entitled to that.

THE COURT: That presents a little different wrinkle than I had thought of. In other words, I thought we were paying damages or awarding damages to an injured party.

Damages are different from royalties as such. Chuck Berry is not a plaintiff here. I am not making an award for Chuck Berry's benefit or whoever it is that wrote Angel Baby -- who did write Angel Baby?

MR. BERGEN: Rose Hamlin, your Honor. Rosie of Rosie and the originals, a name that will go down in history.

THE COURT: She is not, as far as I know, one of the several parties in this enjoyable lawsuit, and therefore -- I suppose that in the damage award to

Capitol we could have had a lot of people -- there may have been a lot of other people damaged. They didn't happen to be suing.

MR. KANZER: But, your Honor, I think we have a difference here.

THE COURT: Are you sure?

MR. KANZER: Let's take a Chuck Berry situation, because it is the simplest one --

THE COURT: I am not awarding actual royalties here. If I were just awarding royalties in gross, I would simply direct a payment of the gross sum of $22,914, or whatever it would be. But that isn't being done.

MR. KANZER: What I think your Honor is doing, you are trying to make us whole, that is the object, to make -- to give us enough money so that we will come out in the same place as we would have net if we had had performance.

THE COURT: Look, Mr. Kanzer, that is beside the point. That is a platitude.

The point is how can you tell me that you have to pay Chuck Berry or Rosie Hamlin 50 percent of the damages applicable to their songs, whatever that is, and however you figure it out, and I guess we could go back and figure that out, but what obligation is there?

MR.KANZER: I think the obligation is a con-

tractual one with a writer that --

THE COURT: Is there a contract saying we will -ay you 50 percent of any damages we recover in the federal district court?

MR.KANZER: Certainly not. There is a contract, assuming from Mr. Zucker's testimony, and I don't have personal knowledge of it, that Big Seven pays 50 percent of any royalties received over to the writers.

What your Honor is doing is giving, as I understand it, the amount of royalties that would have been received had there been proper performance. That is one component of the damages that we are asking for.

THE COURT: No. I am not doing that. I am giving damages. Just as I did -- thought I was giving damages to Capitol -- I didn't give them, I didn't give Capitol gross sales price and then say, Capitol, you goout and you pay off all the people that would have earned money from this gross sales price if you had gotten it. There might have been a lot of people who would have earned. the packagers, the people who did the pressing, I don't know who all of them are, and I won't try and go over all of that, but I didn't do that and it would have been completely inappropriate.

It may be a different situation here.

MR. KANZER: I think it is.

THE COURT: I am not clear on it. I just want to take it very carefully and make it clear, I am not awarding royalties as such.

MR. KANZER: I grant you are not awarding royalties as such, you are -- I thought you were --

THE COURT: I am attempting -- really -- this I thought was agreed upon, but it can be varied, but I am awarding damages which normally in a situation like that -- like the one we have, would be the net profits which would have been earned.

MR. KANZER: I agree, absolutely. I just question whether in fact Big Seven would not have an obligation to pay over --

THE COURT: You can't just raise a question.

MR. KANZER: The contracts aren't in evidence so I couldn't argue from them even if I knew what they said on this point, your Honor.

THE COURT: I am afraid I can't give damages to Big Seven based on the assumption that there is some other beneficiary to those damages, namely, Chuck Berry and Rose Hamlin -- is it Hamlin?

MR. BERGEN:Yes, your Honor.

THE COURT: Okay.

Now, obviously if I made a damage award of X dollars and then Berry and Hamlin walked in and sued Big Seven for half, that would be contrary to my intent, you know, but I think --

MR. KANZER: I'm not sure that's a protection to Big Seven, though.

THE COURT: But I don't know how you get protection without making a record. But anyway, I don't see how I can do that and at least I can certainly make it clear that I am awarding damages and that it excludes any amount applicable to them. That's as good as I can do. What about these other items?

MR. KANZER: Well, the other items I think we are talking about packaging allowances, collections, et cetera, the only testimony I believe on this was Mr. Zucker indicating that he had not included them, that they were marginal. I don't think that he gave any figures. I believe that Mr. Straus estimated it at 20 percent without stating what the basis --

THE COURT: Extra expenses on the foreign?

MR. KANZER: Yes. And I don't believe he gave any basis for his estimate of it.

MR. BERGEN: He qualified himself as an expert, Mr. Kanzer. You weren't here, but his testimony is -- was

given in conjunction with Exhibit DX-1 as to what these allowances were.

THE COURT: Let me follow that. Mr. Bergen, 20 percent of what?

MR. BERGEN: May I just look at it, your Honor?

THE COURT: Yes.

MR. BERGEN: I think that is 20 percent of the retail -- I believe it was the -- 20 percent of the wholesale selling price. He has here packaging allowances and collection fees. I believe he -- and I can try and find that in the record, but he articulated --

THE COURT: 20 percent of the royalties.

MR. BERGEN: 20 percent of the royalties, I am sorry, 20 percent of the royalties.

MR. KANZER: Well, in effect, your Honor, that is 10 percent rather than 20 percent because you are cutting in half the amount of the royalties you are allowing us because you are excluding the foreign. Is that correct?

THE COURT: I'll have to read over his testimony.

MR. BERGEN: The packaging allowances comes right off the top.

MR. KANZER: Well, yes, but that would have the effect of reducing total royalties, if we -- we get

50 percent of the balance in effect and --

THE COURT: The trouble is, you see, Mr. Straus, he went about his calculating in a little different order, that is why it is a bit of a problem.

He takes his 20 percent -- obviously 20 percent of a figure of 3,000 which he has, and the 3,000 is the --

MR. BERGEN: That's what he arrives at --

THE COURT:It is the gross royalties due before you even take off the writer's share or the foreign subsidiary share or anything.

MR. BERGEN: That is correct.

THE COURT: I think we can apply that. Okay.

I think we have canvassed onboth sides the different elements of damages, and I think I have your positions.

Do either of you want to add anything to that? The two remaining things I want to cover this afternoon, I want to cover this enhancement -- you know, loss of --

MR. KANZER: Your remark meant we have covered the question of mechanical royalties only.

THE COURT: Right.

MR. BERGEN: I do want to be heard briefly on the question of whether it was Rock & Roll or Walls and

Bridges.

THE COURT: You go ahead now.

MR. BERGEN: Fine.

THE COURT: What I'd like to do is finish up with this mechanical royalty claim.

MR. BERGEN: I think Mr. Levy conceded in his deposition, and I represented it into the record, and in his trial testimony, that he understood that the next album was going to be the Rock & Roll album and he also understood that Mr. Spector, you know, intervening antics, disappearing with the tapes, made it impossible for Mr. Lennon to put out the Rock & Roll album before Walls and Bridges.

THE COURT: Have you got those references?

MR. BERGEN: I do, your Honor; specifically, at the transcript, 40 -- 4012 to 4014, and then at page 4039 --

THE COURT: 4 what?

MR. BERGEN: 412 to 414, and then at 4039 --

THE COURT: 412?

MR. BERGEN:No, 4012.

THE COURT: 4012 to what?

MR. BERGEN: To 4014, I questioned Mr. Levy about which album was going to be the next album and I believe

he agreed that it was going to be the Rock and Roll album and then at pages 4039 to 4041, about the middle of the page, I read into evidence excerpts from his deposition where I believe again it was clear that Mr. Levy understood that the Rock & Roll album was going to be the next album. To summarize it briefly, he sent over -- he was told that Mr. Lennon was recording this Rock & Roll album with Phil Spector, that discussions were about --

THE COURT: This is at the time of the come together settlement?

MR. BERGEN: That is correct, before it. That whole basis of Mr. Lennon being agreeable to settling the case was that it wouldn't cost him any out-of-pocket money. He would go in and record three of Mr. Levy's songs on the Rock & Roll album and therefore Mr. Levy would receive the royalty by way of a settlement of the come-together suit.

THE COURT: And I take it that You Can't Catch Me was a Rock and Roll song, right?

MR. BERGEN: That is correct, your Honor And so was Ya Ya and so was Angel Baby, these are all songs that had been testified to in the record that were rock and roll songs from the 1950s and 1960s and Mr. Levy went on --

THE COURT: I guess your argument would be that just any other album of Mr. Lennon's would normally

be albums of -- would be an album of his own compositions, right?

MR. BERGEN: That is correct.

THE COURT: And if you are talking about Rock and Roll songs from Big Seven you are talking about a special type of a John Lennon album, namely, what he did in rock and roll?

MR. BERGEN: That is correct. What everybody referred to in this case as oldies, oldies but goodies.

THE COURT: What about that, Mr. Kanzer? I am sorry, you finish.

MR. BERGEN: And also Mr. Levy testified on his deposition that, and I read it into the record, that -- and I asked him questions about this earlier on his cross examination at pages 408 through -- page 4011, when the settlement was made he understood that Mr. Lennon was in the recording studio with Mr. Spector and they were doing this oldies but goodies album. He sent over to Mr. Lennon some examples of songs from his catalog that could be played on the album, he understood at one point that Mr. Lennon had already recorded two of the songs, You Can't Catch Me and Angel Baby and that this was in compliance with the settlement and that this was supposed to be the next album, and he also testified that he understood that because Mr. Spector

disappeared with the tapes and ran off with them that Mr. Lennon could not complete the oldies album. It was then that Mr. Lennon got the tapes back just before he was ready to record Walls and Bridges, he went ahead and did that and put on Ya Ya, and I think Mr. Lennon testified that it was kind of a joke because he and Mr. Levy were really the only people who knew why he had put Ya Ya on Walls and Bridges, because he was going to do it on the Rock and Roll album, and that as soon as that album was finished and out he went back to the Rock and Roll.

I think it is clear from the testimony, certainly from Mr. Lennon and from Mr. Levy, on his deposition and at the pages I cited to in the transcript, where I cross examined him about that, that he understood that the next album was going to be Rock and Roll and not Walls and Bridges which at the time of the settlement there wasn't any discussion about Mr. Lennon doing an album of his own compositions and then sticking in three of Mr. Levy's songs.

THE COURT: Mr. Bergen, let us suppose that you have a settlement phrased in the way it was at the time -- the come-together settlement, the word is the next albjm. Let us suppose that they really were thinking of the album that was then being worked on, the Rock and Roll album. Now, then things get fouled up on the Rock and Roll

album, as they did, and Lennon inserts -- Lennon abandons the Rock and Roll and he --

MR. BERGEN: For a reason.

THE COURT: All right, for a reason, all kinds of reasons, good reasons, but he's still got a contract with Levy. He starts work on another album and he puts that out.

Now, at that moment, that is literally, and just looking the literal words, the next album, it is chronologically the next album.

MR. BERGEN: That is correct.

THE COURT: And at that moment let's assume that the Rock and Roll album is in a kind of a shambles, Lennon has had these bad experiences with Spector and he is discouraged, whatever.

Now, he still has an obligation -- he has an obligation to record three Levy songs. He can't just abandon that obligation because things have gone sour on the Rock and Roll album, can he?

MR. BERGEN: But he didn't abandon it. I agree with you the language says "The next album" but everybody knew that the next album was going to be the Rock and Roll album. He dkdn't abandon it because he testified that he listened to those tapes in early July of '74 when he was

all set to go into the studio for Walls and Bridges, and he had the songs that he had written and he had the musicians all lined up, and when he listened to the tapes and realized what bad shape they were in, he realized that he couldn't put the album together without, first of all, doing more work on it and also reworking those tapes. Remember, he only had nine songs. So he put it aside. He didn't abandon it. He put it aside and as soon as he was finished with the Walls and Bridges album he went back to it to complete it.

That's what he told Mr. Levy on October 8th. Now, I agree with you that maybe somebody should have picked up that loose ball and called Mr. Levy and said, "Here's our problem, we have got to go ahead with Walls and Bridges, we have got the musicians lined up, John is going to go back to rock and roll as soon as he finishes."

But the parties clearly, despite the fact what the language in the settlement said "The next album" they understood that it was going to be the Rock and Roll album because these three songs wouldn't fit, they wouldn't fit in the artisitc sense into an album of Mr Lennon's old songs. Mr. Lennon wrote nine or ten songs and put them on the Walls and Bridges album and these three songs would be completely out of place --

THE COURT: And Ya Ya you are saying was only there because of an aberration, it was just a little bit of a difficulty --

MR. BERGEN: I think Mr. Lennon testified his son was in the studio, it was a little difficult, they did a short end version of it and I think he testified on cross examination on the main part of the trial in January that Ya Ya was a joke in the sense that he -- a joke between Mr. Lennon and Mr. Levy, they both knew why it was on the album and nobody else did.

THE COURT: Let us carry your argument a little farther. If there is a damage claim here -- let's take the claim about You Can't Catch Me. The claim on You Can't Catch Me is that it was on the lower selling album Rock and Roll rather than on the higherselling album Walls and Bridges -- that's what the claim on You Can't Catch Me is for, isn't it, Mr. Kanzer?

MR. KANZER: I would phrase it somewhat differently. The claim is that You Can't Catch Me should have been on Walls and Bridges --

THE COURT: On mechanical royalties the advantage to you is because it would more --

MR. KANZER: When you do the computation, it is correct, the difference comes out to which album it is on --

THE COURT: If Rock and Roll had sold more you wouldn't be claiming any damages, right?

MR. KANZER: AT least on You Can't Catch Me.

THE COURT: I am just sticking to that. I will come to Angel Baby in a minute.

There is something a little anomalous about that damage claim because -- I can see Mr. Bergen's point that You Can't Catch Me was not a song that really would be appropriate for Walls and Bridges or was ever contemplated for Walld and Bridges. It was contemplated for the Rock and Roll album, so why are you getting damages for hypothetical sales of You Can't Catch Me on Walls and Bridges, which is an album it never -- it would have stuck out like a sore thumb on that album.

In other words, the only royalties that Mr. Levy was ever really, in a basic sense entitled to, as far as You Can't Catch Me, would be the royalties that were to be obtained because of it being on the album it was intended to be on, thatis, Rock and Roll. I am just suggesting this, I am not trying to rule at the moment. But I am just tossing this out.

MR. KANZER: Can I respond?

THE COURT: Another thing that one can say, and I guess I have already said it, if the sales of Rock

and Roll were less than they should have been, that was a somewhat self-inflicted punishment on the part of Mr. Levy. I have already held that the reason Rock and Roll didn't sell more than Walls and Bridges was because of Levy's own activities.

So there is something a little anomalous about assuming that somebody gets damages. Levy gets damages because of the -- because of the theory that You Can't Catch Me was supposed to be stuck on Walls and Bridges. There is a lot of anomaly in that.

MR. KANZER: The first thing I want to note is that at trial we objected, and I maintain my objection, to any attempt to go into what the parties theoretically expected the next album to be. This was an instrument, a distinction which was the equivalent of a writing, arrived at in open court. It says very specifically what the deal is and Mr. Bergen is trying to --

THE COURT: In the parol evidence rule there is no application. You can always use extrinsic evidence to interpret language of a contract.

MR. KANZER: When the contract language is ambiguous "next album" is not ambiguous,it is very specific.

THE COURT: Since when did it rule about interpreting contracts apply only to ambiguous words?

MR. KANZER: I was under the impression that that's exactly what the parol evidence does say, that it can only be used to elucidate a document where the terms were ambiguous. When they were clearcut it was not allowable.

THE COURT: What is so clearcut about the words "next album"?

MR. KANZER: It was later defined in the stipulation that the next album meant the album following the album that was currently about to be released, namely, the Mind Games, I think it is totally unambiguous that whatever came out after Mind Games is the next album.

THE COURT: What if the parties had in mind at this time the Rock and Roll album as the next album?

MR. KANZER: All right, I think --

THE COURT: However, they didn't have a name for it, it hadn't gotten to that point, so Monday morning when we were all trying to get that case settled, and everybody was rushing around, nobody wants to go to trial, the Judge is saying either get that stipulation on the books or you go to trial, you know, what are they supposed to say? They don't have a name for the album.

MR.KANZER: They could have said that John Lennon is presently planning to put out an album of rock and roll songs and when that album comes out that album

shall include three songs owned by Big Seven or a company affiliated with it. That's one thing they could have said that wouldn't have been very complicated.

What we are getting confused is an expectation of the termsof the deal, that is there is a sufficient distinction between what the parties bargained for, and what Levy bargained for was the next album as defined in that stipulation was to include three of his songs. There was a general expectation that it would be satisifed by an album that was then apparently under production with Phil Spector. But that was not part of the deal. There was no necessary rule that it had to be included only on the Phil Spector album. I think the emphasis on the word "next" is exactly what one would anticipate. Levy wanted to make sure that he was going to get performance soon.

Under Mr. Bergen's interpretation there would never have been a breach if in fact the Rock and Roll album stayed under production for the next ten years. The only time a breach would occur under his definition is once that album finally is released, if it does not include three rock and roll songs owned by Big Seven. That is ridiculous. The fact, I suppose if it never had been released there would never been any breach as far as Mr. Bergen's argument goes.

THE COURT: That really is a hypothetical case. I think that Mr. Bergen would concede that if for some reason in a different case Lennon just stopped recording and there was no attempt to carry on the album that was in contemplation,and the only next album was Walls and Bridges, well, there would have been a breach. Exactly what form the breach would have taken --

MR.KANZER: As to mechanical royalties it would have been simple, it would have been 6 cents per record sold.

THE COURT: There -- that isn't our case. The reason that Levy didn't earn as much as he did on the Rock and Roll album in the way of royalties was because he prevented, at least I have held his actions prevented its sales from being higher.

MR. KANZER: But I don't think that is the point. I think the point is that he was entitled to have three of his compositions, copyrights of which were owned by him or his companies, included on the next album as defined. When that didn't come out --

THE COURT: Let us stay with the issues of law.

MR. KANZER: I think it is an issue of law.

THE COURT: Are you saying that under the applicable law of New York, that as a matter of law the evidence about -- the evidence of the nature that Mr. Bergen is

referring to just isn't -- can't be given effect?

MR.KANZER: Yes.

THE COURT: You literally have to take t..e word next album according to their chronological meaning?

MR. KANZER: Yes.

THE CO'JRT: All right. Is that something we should have briefed?

If it turns on that --

MR.KANZER: That is one of the issues.

(Continued on next page.)

MR. BERGEN: We have maintained all along, your Honor, that the next album was supposed to be the Rock & Roll ablum.

Mr. Lennon was in the studio in Los Angeles at the time this settlement was reached.

THE COURT: Mr. Kanzer, why don't you give me by mid next -- I don't want to prolong this, but I don't want also to go off on an issue of law that I am just ignorant of.

Give me a short memo of about three pages by next Wednesday on this point, and if Mr. Berg wants to reply, he will have a couple of days to reply. This ought to be very short.

MR. KANZER: It will be. I'm in an all-day deposition Tuesday. It will have to be short.

THE COURT: What do you say about the facts?

MR. KANZER: On the facts, it seems to me, your Honor, you are now making an assumption that there was good faith on the part of Lennon, which I think is flatly contradicted by the evidence, because we do have, if you go back to what the testimony was in terms of compliance at the time of Walls and Bridges, what we have at that point is clear indication of total wilfulness and -- on the part of Mr. Lennon.

May I read to your Honor a brief passage from the transcript thatindicates that even when it came to putting Ya Ya on, that was not done with reference to the agreement as Mr. Bergen would imply.

THE COURT: That's exactly what Mr. Bergen said. He said that the presence of Ya Ya on Walls and Bridges was not pursuant to this agreement.

MR. KANZER: I was under the impression that it is not what he was saying.

MR. BERGEN: I said that Mr. Lennon knew that he had to record these songs for Mr. Levy, and he put it on because he knew he did, kind of a joke between Morris and John that, you know, "I've got to do these songs, here's Ya Ya," but --

THE COURT: But you are saying that the record which was intended to perform the agreement was the Rock & Roll album, and a full version of Ya Ya was there, a full version of You can't Catch me -- right?

MR. BERGEN: That's correct.

THE COURT: And then Angel Baby was taken out for reasons that we have in the record.

MR. KANZER: May I read a very brief passage from page 907 of the transcript, your Honor. This is a question to Mr. Lennon:

"Q Now, at the time you recorded Ya Ya on the Walls and Bridges album, did you think that you were complying with the October 1973 Come Together settlement which had been made before Judge Griesa?

"A I didn't even think about it.

"Q Did you discuss it with Mr. Seider?

"A No."

Then there is a passage involving questions to Mr. Graham at page 837 where Mr. Graham says the subject of compliance never even came up at the time. No one even thought about the settlement agreement, and that's why no one even bothered to let Levy know. They just abandoned -- for whatever reason, they didn't -- it didn't cross their minds that they had an agreement to comply with.

There was an utterly wilful breach. There was no consideration given to compliance, and, in fact, even though your Honor has found that there was not agreement that Mr. Levy or his companies entered into with Mr. Lennon, the fact is uncontested, I think, that the motivating force that got Mr. Lennon ultimately even to make a pretence of complying with the 1973 settlement was Mr. Levy pushing him.

MR. BERGEN: That is not so.

MR. KANZER: There is no evidence whatsoever --

MR. BERGEN: That is not so.

Mr. Lennon testified that he was going back into the studio as soon as he finished Walls and Bridges.

MR. KANZER: I think it would be more easy to deal with if you let me speak and then you speak.

I believe that I was about to say, Mr. Bergen, that the evidence, as I remember it, was that Mr. Lennon at that October meeting, October 8th, admitted that in fact he had a series of bad tapes and wasn't sure what to do with them.

He was considering an extended play album, he was considering other things. There was not the slightest evidence that he had done anything between July, when he had retrieved those tapes, and October of 1974 when Mr. Levy began pushing him.

THE COURT: That's a little speculative.

I will tell you what, we are -- let's pass this point.

What about the Angel Baby, or the third song which wasn't on anything?

Mr. Bergen, how do you justify that?

MR. BERGEN: Your Honor, I would --

THE COURT: Do you make any claim that that was

not a breach, Angel Baby was not on Rock & Roll?

MR. BERGEN: Angel Baby or a song?

THE COURT: A third song, right.

MR. BERGEN: Well, I go back to what I said before, which I am apparently not going to be able to convince your Honor of, that Mr. Lennon had complied by doing three songs, because Mr. Levy did get, you know, the royalties.

THE COURT: I guess I will have to agree to disagree on that.

Let's get past the -- we have this substantial point about the alleged loss of the enhancement of the copyright of Angel Baby.

Now, the problem I have, Mr. Kanzer, is this, I was very impressed with the group of witnesses who came in, these were experienced music publishers and so forth. And they testified in a general way about the fact that a copyright would be enhanced by a recording of the song by an artist of John Lennon's stature.

That was -- there was almost nothing that Mr. Bergen did or could do -- certainly did in fact to challenge them on cross.

Now, there were two things that happened on Mr. Bergen's case that I think have to be given very

serious consideration, that is, that when the statistics were broken down, except in one case, I believe--when the statistics were broken down, the so-called enhancement from cover records was very minimal, as distinct from the -- just the increase of mechanical royalties from the recording of the prominent artist. We all remember that line of inquiry.

Secondly, there was this witness, I forget his name --

MR. BERGEN: Mr. Robinson.

THE COURT: -- Mr. Robinson, who came in and he testified about Angel Baby. I don't think any of your witnesses had focused on the character of Angel Baby as a song, and the character -- the -- tried to give any opinion specifically as to the potentialities of Angel Baby. They testified as to general rules, so to speak.

Robinson testified about the specific characteristics of Angel Baby and he said that because it was a sound record and not -- whatever the other kind -- it was a sound hit and not a tune hit or something, that he doubted very much that there would be cover records.

It seems to me that gives me great problems with your line of proof which, as I understand it, didn't focus on Angel Baby as such and didn't come through in the

long run with so much enhancement by way of cover records, in any event.

That is my problem with your case.

MR. KANZER: A few points on that, your Honor.

First, to take up the question of Angel Baby in specific. Just as Mr. Bergen argued earlier this afternoon that there was no identifiable writer to pay a share of royalties to if the Court were to award the writer's share to Big Seven in connection with a third song, there never has been any position taken by Big Seven that the song that had to comply was Angel Baby.

Angel Baby, as the Court may recall, in the 1973 stipulation was one of three songs which Mr. Lennon listed as one that he was contemplating using in compliance.

THE COURT: But he had the option, didn't he?

MR. KANZER: He had the specific option to choose others, if he wished to do so.

THE COURT: He said the specific option to choose any. He could choose a sound hit, a tune hit, anything he wanted.

MR.KANZER: He could choose anything he wanted as long as You Can't Catch me was included, that was the one limitation.

Your question supposes, and that was, of

course, Robinson's testimony, that it would indeed have been Angel Baby that would have been the one that ultimately would have satisfied the agreement.

But the point is, Mr. Lennon first of all withdrew Angel Baby. Now, the breach was not withdrawing Angel Baby per se. The breach was simply not recording a third song.

He could easily have chosen another one at that time, and we don't have any basis of saying whether that would have been better or worse than Angel Baby.

What we are left with ultimately is I think the generalities, and that's why our witnesses stayed on the generalities, because there is no way of predicting what a song thatwas not recorded would have generated specifically in terms of cover records.

One can only look to what songs in general do. You can't key it to the non-existent song.

I think it is reasonable to take the position, as our witnesses did, first of all, that whenever -- and I will remind the Court, Mr. Bienstock's testimony was any song that was recorded by John Lennon would have its copyright enhanced. He didn't try to say which ones would more than others.

All our witnesses conceded that some ultimately

produce more revenues than others. Everybody agreed there was no way to predict in advance which particular song would generate a lot of cover records.

All one can look to is what recordings by John Lennon will in general generate. You cannot key it to the specific one. We don't know that Angel Baby would have been the song that would have complied.

Now, on the question of thesongs that we did pick, and you are quite right, your Honor, we concede that the four songs that we picked ultimately showed very little being generated by artists other than the one who was the principal artist who was rerecording the song, if I can phrase it that way. What they did, however, show was that when you have a song, whether it's Oye Como Va or Daddy's Home, or any other song that is recorded by a new artist, the result is a substantial increase in revenue.

Now, I want to focus on the fact there are two different types of cover records. I know Mr. Schurtman stated this during his trial portion. You have both reissues by the recording artist and you have albums that are put out by other recording artists.

One of the things that is most evident, both in Mr. Zucker's work papers and in the song sheets for all four

of his songs plus, indeed, Angel Baby, You Can't Catch Me and Ya Ya, is that every single one shows a considerable number of reissues by artists who had already recorded the song.

The point I am making at this time, your Honor, before I go to songs produced by third artists, is that you cannot assume that the only revenue that will be generated by whatever song Mr. Lennon would have recorded would havebeen the revenue directly on Walls and Bridges or You Can't Catch me.

There is a substantial likelihood that any such song might have been released in the future or a subsequent, either John Lennon album or compilation album, because that in fact is what the evidence shows is normal in the industry.

You have the same song by the same artist being released over and over in different albums, either singly with only works of that artists or in conjunction with other artists, and that is in evidence through the song sheets and through the exhibits showing what the earnings were on --

THE COURT: We've got the -- I would like to take a recess, and there is another hearing that I need to get to.

As usual, the argument of the kind we are having is very helpful to me, and I think probably a little more helpful than just an exchange of briefs, unless there are two or three specific points of law.

I wish you could remain here, and I will try and get back to you.

Are you going to be out of town?

MR. BERGEN: Starting next Thursday. I will be free Tuesday and Wednesday.

THE COURT: Why don't we see how I am doing with that other hearing.

MR. KANZER: Wednesday I would be able to return. Tuesday I do have an all-day deposition which I don't think I can cancel at this point.

MR. BERGEN: I'd be willing to stay right now and do it.

MR. KANZER: Definitely I'm prepared to stay.

THE COURT: We will take a short break.

(Recess taken)

THE COURT: We were talking about the value of the copyright.

MR. KANZER: I believe before the recess, your Honor, I was trying to make the point that there are two types of cover records involved, and one has to distinguish

between the two in terms of calculating damages.

The first type of cover record -- and this is within the definition of the cover record as given by the expert witnesses -- is a cover record in the sense of a reissue by an artist of a further -- either the same recording he has previously made of the work or a new version by the same artist.

To use a concrete example, the second performance of Ya Ya by John Lennon could be deemed a cover recording of his previous recording of Ya Ya.

Now --

THE COURT: It seems to me there are two basic things that might happen to procure, you know, additional mechanical royalties if an artist like John Lennon records a song like Angel Baby.

First of all, the royalties due from John Lennon, or his, you know, or Capitol, or whoever it is, might be very substantial. In other words, the royalty is due to Mr. Levy from John Lennon's own record --

MR. KANZER: And that we have already covered.

THE COURT: We have already covered.

Now, let me get this clear: You are not claiming any expectation of future mechanical royalties on possible future sales of either of these albums, are you?

MR.KANZER: Yes, we are, of course.

THE COURT: As far as John Lennon?

MR. KANZER: Definitely. At least as far as that song involved is concerned.

As to the others, we don't have to make claim because presumably if additional recordings are sold of either Rock & Roll or of Walls and Bridges, Capitol, as I would assume it has an obligation to do, will make the payments.

THE COURT: On Angel Baby, are you saying --

MR. KANZER: I don't want to refer to it as Angel Baby. I would prefer to refer to it, your Honor, as the third song.

THE COURT: We will call it the third song.

Now, in addition to royalties based on the actual sales of Rock & Roll or the actual sales of Walls and Bridges up to the time the record closed, you would claim that you are entitled to loss of royalties for expected future sales of that record, right?

MR. KANZER: Yes. Whether it be on the actual album it was supposed to have been on, that is, Walls and Bridges, or what it would have been on in case it had been reissued by John Lennon in another form.

THE COURT: His recording, in other words, the

loss of the expectation of future sales of that particular recording, right?

MR. KANZER: Yes.

THE COURT: Mr. Bergen, is there anything, as a matter of law, that prevents him from getting that measure of damages?

MR. BERGEN: Let me take the last one first, the resissue in another form.

That is precisely what Big Seven and Adam VIII argued against in the case with respect to Shaved Fish and two future albums that Capitol claimed damages on. They said that that was too speculative, they cited a case, which I have cited in our brief, and your Honor found that that was too speculative.

THE COURT: Let's go back. I assume that --

MR. BERGEN: How are you going to arrive at what the Rock & Roll album is going to sell in the future and what the damages would be, what the royalties would be if John Lennon had recorded a song?

We all know that so far, as has come out in the case, there had been returns on the Rock & Roll album, which are causing the sales to reduce.

THE COURT: I just asked you a question: As a matter of law, if there was sufficient evidence in the

record from which the Court could estimate future sales, is there any reason, as a matter of law, why there couldn't be a damage award to Levy based on the loss of future sales?

MR. BERGEN: I don't think he is entitled to them as a matter of law.

THE COURT: In other words, as a matter of law, no matter -- what is there in the law that says that you can't try to estimate the future sales of the record and give damages?

MR. BERGEN: Because you don't first of all know what the song is, and if they don't want it to be Angel Baby, you know, then you get into pure speculation.

THE COURT: You have an album here, Rock & Roll. It presumably has many other songs -- well, not only presumably, it has a lot of other songs, and this would be only one, and, you know, the album has sold, it sold 342,000, the figure we have been using, and it presumably hasn't stopped. There are going to be sales going on for a little while, aren't there?

MR. BERGEN: Could be. Could not be. That's just it. It may not sell any more records. It may sell one this year and five next year.

THE COURT: What I am just trying to get at is, there is nothing in the law that says you can't -- that a

Court can't try to estimate future sales of something like this and give damages, is there?

MR. BERGEN: I don't think there is.

THE COURT: All right.

So it is a question of fact as to whether there is any basis for saying that, is that correct?

MR. BERGEN: That is correct.

THE COURT: Mr. Schurtman, what do you say is in the record now which would justify the Court in predicting that the probable future sales of the Rock & Roll album or -- well, it would be the Rock & Roll album or the Walls and Bridges album -- is "x" records over and above what is already shown by the evidence in the case?

MR. KANZER: I don't think your Honor understood my point. Let me explain it differently.

My point is that if you look at the song sheets that were introduced in evidence of seven different songs, the four that were used for the projection purposes of Mr. Zucker and the three of the songs, Ya Ya, Angel Baby, and You Can't Catch me that he didn't so use, each of those seven song sheets shows that the invariable practice was that whenever you had a song thatwas recorded by a popular artist, at sometime in the future during the course of the copyright of that song, it was reissued by that same artists.

Many times, in fact, for example, oh, I think it was the Lee Dorsey -- was it Ya Ya? -- whichever Lee Dorsey was on, that was issued twelve separate times.

My point is that is a basis for drawing an inference that when you have a recording by John Lennon, whther it be initially on the Walls and Bridges album, whether it be initially on Rock & Roll or whatever it may initially be on, it is likely that it is going to have sales not just in connection with that album but in connection with being put on subsequent albums --

THE COURT: I didn't know there was all that evidence ab out reissues.

MR. BERG: What he is talking about is the original hit, not the cover records. He's talking about the Rosie and the Originals of Angel Baby, he's talking about the Lee Dorsey of Ya Ya. He's talking about the Chuck Berry of You Can't Catch me.

He's not talking about some song that was recorded after those hits. Even that is pure guesswork.

MR. KANZER: May I just respond right now?

I wish Mr. Bergen wouldn't tell me what I'm talking about, because he happens to be wrong.

If you were to look, for example, at Defendants' Exhibit DR, which is the abstract on Ya Ya, you will find

that, for example, one Trini Lopez -- I can count it right now -- had a reissue -- a quick look would indicate that Mr. Lopez, who didn't have the initial recording on this, has approximately fifteen or more times that he put out the same song.

That's not the Lee Dorsey one. Lee Dorsey happened to be the initial one. That is just one graphic illustration.

If Mr. Bergen likes, we can take others from the same one. I notice there are several by the Shandelles. There seem to be several by --

THE COURT: What form do they take, singles --

MR. KANZER: Reissues, generally.

MR. BERGEN: The Best of the 1950's or the Best of this or that.

MR. KANZER: Exactly.

MR. BERGEN: There is no proof that John Lennon's album is going to be reissued.

THE COURT: What bothers me is this, that if you are talking about the probabilities of further sales of the third song, either in continued sales of the album, like Walls and Bridges, or Rock & Roll, or you are talking about it being issued as s single, or are you talking about it being issued in a "Best of" album, or some other

thing, you are still talking about the prediction about future sales of the third song as recorded by John Lennon.

Now, it would seem to me that there would have to be some evidence in the form of expert opinion or whatever specifically related to the third song.

Just the fact that other songs had sales, I don't know what that means. The e can be -- I would think I would know before I ever heard any evidence in this case at all that there are lots of songs that . ep being reissued and keep being sold for years and they sell lots and lots and lots of copies.

Still other songs sell less, still other songs do purely. You know, the history of a song can vary all over the log, depending on the character of the song, the demands of the times, the tastes of the times and so forth.

That is one thing that I thought Mr. Robinson illustrated fairly vividly.

In a way you would know that before you even came here.

Now, what is there on which I can base a prediction as to the quantity of future sales of the third song? If I don't even know what that song is, I'm really in one pickle.

I might assume Angel Baby, just to pin this

down a little bit, but you don't want me to assume Angel Baby, and if I assume Angel Baby, what evidence is there that you have produced relating to the specific prospects of the sale in the future of Angel Baby?

MR. KANZER: Well, your Honor, we don't have anything that I can think of offhand that is specific on Angel Baby.

As your Honor knows, we originally had acted on the assumption that in fact there had been at least one cover record on Angel Baby. It turned out that, I think through no fault of my client, that my client was mistaken about that.

THE COURT: Was that the one --

MR. KANZER: That was the Maxine Brown, your Honor, that problem where we had a license that said she was recording it, we received royalty statements that were consistent with that, and it then turned out that the Harry Fox agency had, whether by typographical error or what have you, put incorrect information on the license that they had issued, and we had picked that incorrect information up on the song sheet kept in the ordinary course of business --

THE COURT: So there isn't any cover record.

MR. KANZER: As far as I am aware, there is

no cover record other than the fact that John Lennon, had he recorded it, might have influenced people to make cover records and there --

THE COURT: Let's not get to cover records. Stick to the future sales of John Lennon, John Lennon's own recording of Angel Baby, or whatever else it would be.

MR. KANZER: There could be nothing specific in the record for the simple reason that we are dealing with a song that was not recorded and released.

If we are dealing with Angel Baby, we have the fact that Mr. Robinson feels it's not the song people would tend to record.

On the other hand, we have the very objective fact that John Lennon stated that it was one of his favorite rock and roll songs, and for whatever reason John Lennon initially decided thatwas a song that he wanted to record, and he did say, your Honor, thoughout that he regretted up to the last that he couldn't get it in, but he happened to feel that, one, that his performance was unsatisfactory to him; and, two, that the album had to have one fewer or less songs on it because of time problems, and he chose that one.

But the fact is that an artist of the stature of John Lennon thought Angel Baby was worth recording, which

is quite contrary to the indications that Mr. Robinson had.

THE COURT: Let's stick just a moment to the album Rock & Roll.

Is there anything in the record specifically about future sales of that beyond the 342,000?

MR. KANZER: I don't offhand know of anything in the record that would indicate --

THE COURT: It didn't stop selling as of the 342,000.

MR. KANZER: No. But I have no idea whether it would have a net plus or a net minus in sales from that point on, your Honor.

THE COURT: All right. I think that's about all we can do on that subject.

The only thing I ask you, Mr. Bergen, is this: That I find it very hard to say that the enhancement of Angel Baby would be just zero. In other words, we did have these witnesses for Mr. Levy come in. They, it seemed to me, made a lot of sense in saying as a general proposition that if you have a real superstar like Lennon record a song it does something for that song.

To just say that the enhancement of the copyright is just zero or just nothing, I think is just as unrealistic as saying the enhancement of the copyright would amount

to $300,000.

My feeling is that there may be -- and I guess inevitably it would be modest in view of the record -- but there might very well be some enhancement.

Let's suppose John Lennon recorded Angel Baby, okay? You aren't prepared to say that that copyright is just exactly where it was before John Lennon recorded it, are you?

MR. BERGEN: Based on Mr. Robinson's testimony, it would be fair to say that it probably isn't worth any more than $500 to $1,000,which Mr. Robinson said he would pay in order to get John Lennon to do a demo of this record.

My point is that there isn't anything in the record -- the plaintiff hasn't given you anything in the record on which to base even a guesstimate of what it's worth.

They started off with the four songs that they selectively picked from -- not even from Big Seven's catalog, they picked them from one of the other catalogs and those songs proved, after we finally got the complete information, to show that, as your Honor put it, the damages were peanuts.

So then they fell back on -- one song I believe

your Honor was referring to before when you told Mr. Kanzer what your basic problems was with this part of the claim, and that was close to you. Well, that isn't a Big Seven song.

I submit that Mr. Robinson explained in detail why you can't use Close to You --

THE COURT: That's the one that --

MR. BERGEN: The Carpenters sang. When you take Close to You and compare it to Angel Baby, you've got no cover records on Angel Baby, and yet on Close to You, look at some of the people that recorded that song: Frank Sinatra, there were about a hundred cover records of it, Andy Williams, Johnny Mathis, Pearl Baby, Nancy Wilson, Perry Como, to just name a few.

There is a song that is a great song because the Carpenters did it and made it popular, and as Mr. Robinson testified, Mr. Bachrach's music, he composed Close to You, was a little bit ahead of its time.

I think Mr. Kanzer put his finger on the problem in his own argument, he said you can't specifically say what cover records would be generated. That is precisely the point, and that is why the damages are so speculative that you can't pick a figure.

If Angel Baby isn't the standard that you go

by, then what is the standard? It can't be Close to You, because Close to You isn't a Rock & Roll song. We have to be talking about a Rock & Roll song.

So I submit that you have to fall back on either Angel Baby or look at the track record of You Can't Catch Me and Ya Ya.

That shows that the enhancement is little if anything. We don't have any great rush of cover records on either You Can't Catch me or Ya Ya.

I think on page 17 of my memo that was dated April 23rd, I quoted where your Honor questioned Mr. Bienstock, who was the plaintiff's witness, and you were talking about how do you reach an estimate, you know, you're going to have some songs -- if we are ten years down the road from today, you are going to have some songs that were popular and some that weren't, some songs that resulted in covers and some that didn't, and you said, "Because some will be more attractive than others," and the witness said, "Absolutely."

And you asked the witness if there was to be a judgment about what songs were popular or not, and you said you don't have a judgment, in other words, if you heard a group of songs, you couldn't predict which songs would earn a lot and which songs would earn a little.

And the witness said if somebody could they would earn millions.

The proof is there was a failure or proof here. Maybe you could say yes, there is some enhancement, but the problem is there is no proof in the record from which the Court can even make a rough estimate of what the --

THE COURT: What is the difference between this and trying to estimate what Mr. Lennon was damaged when his likeness was used and his name was used in the Roots album?

MR. BERGEN: There, your Honor, you have some standards. We were talking about the --

THE COURT: Putting a dollar value -- sure, there was evidence about elements of damage, but -- elements of damage in the way of -- let me start again.

There were elements of damage in the badtaste of the picture and so forth, and the cheapness and the commercialism and so forth, but how -- you know, you are always faced with putting -- not always, but very often you are faced, and you were certainly in that instance, with putting a dollar figure on something that is very intangible.

MR. BERGEN: There, there was specific evidence as to what the damage was. There was testimony by

Mr. Lennon, there was testimony by Mr. Marsh.

Here they are unwiling to accept Angel Baby as a standard, so we don't have any standard, we have a song, in quotes, and nobody knows what that song is, whether it is a good song, a bad song, a mediocre song.

On the one hand, on the counterclaims they wanted to take the position that John Lennon's Rock & Roll album was not a good album, that it was not critically received.

On the other hand, they now want to take the position that if John Lennon had recorded this unknown song it would have resulted, because John Lennon recorded it, in an unknown number of cover records.

If they take Angel Baby, I think everybody agrees that the Lennon version of Angel Baby, as it stood, and was released on Mr. Levy's album was a terrible version of the song.

Your Honor found that there were elements of the song that were out of tune with each other, the band was playing in a different key from what Mr. Lennon was singing in.

So certainly that version of Angel Baby isn't going to cause other people to rush to record the song. It would if anything have a negative effect and turn people off from recording the song.

I think it is different in that there is proof, and there was proof on the name and likeness issue as to what the damages were.

How Mr. Lennon was damaged was proven.

Here there is ano proof as to what the damages are, and there is no proof as to how they were damaged because we don't have a song, we don't have a standard to even start from.

MR. KANZER: Your Honor, you may recall Mr. Bienstock's testimony at -- may I read it to you? It's short.

THE COURT: Sure.

MR. KANZER: Page 3577 of the transcript. Mr. Schurtman asked him:

"Getting back to my set of facts about the song that Mr. Lennon didn't record, there has been estimony by an agent connected with Big Seven that based on Big Seven's experience he would estimate that the enhancement to the earnings of the copyright if Lennon had recorded the song would have ranged from $96,500 to $179,000 over the next few years.

"Based on your experience, would you say that that is a reasonable estimate?"

Mr. Bergen objected, your Honor overruled the

objection and permitted the answer, and the answer was:

"I would think it is entirely possible that those figures could have been achieved and possibly exceeded."

Now, Mr. Bienstock is certainly a well-qualified expert. He has been in this industry --

THE COURT: What is that page?

MR. KANZER: 3577.

Mr. Bienstock, who has been in this business for a long time, is with one of the largest, most reputable music publishers, when asked the question of what -- of what even an unknown song by John Lennon would generate in the nature of cover records, he indicated that he thought those projections were entirely reasonable and might even be exceeded.

Under those circumstances, I just can't say that there is no basis in the record for finding substantial damages.

I think that we can, considering the defendant's own activity of not releasing and recording the song prevents us from having any definitive view as to which the song would have been and how many cover records it would have in fact generated, because he just frustrated any possible explanation, and all we can do is look and see what the experts say.

MR. BERGEN: Mr. Bienstock's estimate of $150,000 was based on these figures with respect to Oye Como Va which later turned out, when we finally got the backup information, to be peanuts.

I would like to remind your Honor that there is a quote on page 4 of our memo again, the April 23rd memo, which quotes from a case that the plaintiff cited claiming on the counterclaim that the damages being sought by Capitol and EMI and Lennon with respect to future albums was speculative.

It's from the case called Eulitt against Kapla. If I can insert the word "record" for the word "book" in that quotation, I'd like to read the quote to you:

"Plaintiff claimed one-half of ten percent of an unknown retail selling price on an unknown number of copies of a non-existent record and a percentage of unknown proceeds from the non-existent sale of record rights of a record never written or never published. Whether the record would have met with public favor was entirely conjectural without a factual basis for computing the amount of the prospective royalties. Plaintiff could not recover compensatory damages."

That is precisely this case.

I quote from 3472 of the transcript: "I reject

Capitol's claims for damages for actual or projected losses of sales in albums subsequent to Rock & Roll. This claim is too speculative for any monetary award."

MR. KANZER: We have a very different situation from the case which Mr. Bergen has just referred you to because here we have a long-standing track record. We are not dealing with an author who is relatively unknown.

My recollection of that case, I am sure Mr. Bergen will correct me if I'm wrong, is that the author involved hadn't a long-established track record. There was no way of predicting what sales on his particular books would possibly generate.

Here we are dealing with a superstar of the record industry, someone who defendant has gone out of his way to say is one of the world's greatest recording starts.

We are not dealing with a situation where it's an unknown and we have no idea what the sales would be of works of an unknown.

We are dealing with a John Lennon, three expert witnesses having testified uniformly that all they needed to know was that John Lennon was recording a song, in their catalog and they would know it wouldhave a substantially positive effect on that song's worth to them.

Now, also, just a passing note that Mr. Bergen

is incorrect when he says that Mr. Bienstock's testimony was based on the projections and the data contained in the Zucker work papers. That is not what the quote shows.

The quote was framed in terms of well, Mr. Zucker has made these projections, but what do you think those numbers themselves mean in terms of -- Bienstock was asked whether the numbers themselves, without even reference to how they had been calculated, sounded reasonable to him, and he was saying on the basis of his experience that they were reasonable numbers.

THE COURT: I must tell you, Mr.Kanzer. it is not of the same weight as if a witness had taken this song, analyzed its character and come up with his own figures.

These were figures given to him by Mr. Schurtman, and I will consider it for what weight it should be given, but it's not -- I do not think it is the equivalent in strength to having him come up with his own independent estimate.

These are figures derived and given to him by Mr. Schurtman, right?

MR. KANZER: Mr. Schurtman -- let me remind the Court what the sentence and the statement actually is.

Mr. Schurtman says to Mr. Bienstock in effect, someone else has made an estimate that the losses would be

between $96,500 and $179,000.

THE COURT: Those figures come from -- weren't they taken from those --

MR. KANZER: They were taken from the Zucker projections --

MR. BERGEN: Those figures were wrong.

THE COURT: They were taken from --

MR. KANZER: they were taken from the four songs that Mr. Zucker --

THE COURT: They were sort of the high and low of the estimates after -- of the earnings, mechanical royalty earnings after the recording by the comparable star of John Lennon, right?

MR. KANZER: Not comparable star. We --

THE COURT: The event that you focus in on.

MR. KANZER: Yes.

THE COURT: I will have to deal with that. We have to draw this to a close now.

MR. KANZER: I would like to point out one last thing. Mr. Bienstock did testify at page 3576 that in his experienced he had never had a situation where a song that was recorded by prominent artists didn't have subsequent substantial increases in revenues.

THE COURT: All right.

THE COURT: All right. We have two things I want to cover very quickly, and that is the specific performance of phase 2, and I also want to see if there are any loose ends, such as I know we -- I was a little concerned about the -- whether we had applied this artist's share appropriately in the case of Mr. Lennon's damages.

I mentioned something about that, and it was left -- something came up about that.

Mr. Bergen and Mr. Kanzer, I think I was reasonably careful in the case of Capitol's damages in its counterclaim and EMI's damages to make sure that those were net profit figures, right?

MR. BERGEN: Yes, sir.

THE COURT: Now, at some point in our later discussions when we got into this subject of writer's share, I was not -- I thought somebody raised the possibility that I had not been consistent in dealing with Lennon's damages.

Does that ring a bell?

MR. KANZER: I haven't been focusing on this issue for sometime, your Honor. The best I can recall is that there was a question of AFM payments.

THE COURT: Maybe that is it.

MR. KANZER: I don't think that we got in

ultimately the necessary -- I can't recall at the moment whether the necessary evidence got in or whether we may have to bring it to the Court's attention in a different way, because that was an open issue which the Court has asked for additional information on, and I don't recall whether in fact anything got in.

THE COURT: I don't want to prolong this trial. I just don't want to wake up and have something that was raised in the record not dealt with.

Let me ask you, are you now -- I have rendered a decision. Is there any motion to amend the decision in any respect?

MR. KANZER: We do anticipate filing a motion. We have been waiting to see what the conclusion of this particular part is because we may be asking for broader things.

For example, earlier I indicated today that we are now going to be considering concluding a 52B motion, a recomputation of Capitol's damages, if, in fact, as I think is the case, Capitol was awarded damages for the Canadian subsidiary's losses.

THE COURT: Let's -- you are not prepared to deal with it now. You are telling me you are going to file a Rule 52B motion and -- I will say this, obviously you

have the rights under the rule, and whatever you wish to do should be done in a 52B motion, otherwise it's waived.

Is that understood?

MR. KANZER: When you say waived, we do have appeal rights, your Honor. I don't know whether --

THE COURT: I am talking about anything -- it should be understood, I am specifically talking about the -- whether there was any flaw in the calculation of Mr. Lennon's counterclaim damages in respect to union payments or anything of that nature.

If you want to bring that up, bring it up to me, don't bring it up for the first time in the Court of Appeals.

MR. KANZER: We certainly intend to file 52B motion where we will include everything we are at that time aware of. If we subsequently become aware of something else, I don't think that we will have waived it, your Honor.

One thing Mr. Diamond just brought to my attention --

THE COURT: What do you mean if you subsequently become aware of something else that you haven't bothered to raise with the district court, you are going

to run up to the Court of Appeals with it?

MR. KANZER: Well, your Honor, obviously if it has never been in the record, we can't raise it in the Court of Appeals --

THE COURT: I am specifically suggesting that I would feel that you should bring it to my attention if you've got this type of problem with the calculation of damages I have sought to deal with.

MR. KANZER: We intend to try to do so. One thing Mr. Diamond had just pointed out to me, which I hadn't thought of because we hadn't prepared for this, there is a question of whether Mr. Lennon was awarded royalties that frankly are payable to Mr. Spector, who is also not a party to this action, and that may well be something that will have to be recalculated, because Mr. Lennon's testimony was that he had to pay a portion of his royalties over to Mr. Spector.

THE COURT: Anything like that is a 52B motion. You are not prepared to argue that now?

MR. KANZER: No, I am not, your Honor.

THE COURT: Now, look, the final point is the specific performance. It does seem to me that -- my understanding of the law, after looking it up, is that to get specific performance you basically have to show

that somebody -- that the party against whom you seek specific performance did something wrong that gives you that right, and -- I don't know where it is -- and that you can say that Lennon did anything wrong on phase 2. You are the people who prevented the phase 2 from being performed, aren't you?

MR. KANZER: I think that what we would then be in is a situation where if your Honor determines that as of this point there is no breach of part 2, we will then be in the artificial situation where I could today have Mr. Levy make a demand on Mr. Lennon, and if Mr. Lennon does not comply, we would then be right back before this Court seeking enforcement and asking for damages for Mr. Lennon's th[illegible] breach.

THE COURT: What do you mean, make the demand now?

MR. KANZER: Well, your Honor, Mr. Levy and his companies certainly didn't waive their rights under the part 2 of the agreement.

THE COURT: What was the January 9th letter?

MR. KANZER: The January 9th letter, as I think we have argued at some detail in our brief --

THE COURT: If somebody tenders --

MR. KANZER: They didn't tender, your Honor.

THE COURT: What do you mean by that?

MR. KANZER: That's exactly what we have been trying to make this Court understand.

There is a distinction between their writing a letter, which didn't even get there timely, but passing that for the moment, writing a letter in which they in effect offered to enter into negotiations for a license and actually tendering the license itself.

Now, in fact we know that by the defendants' own exhibit, CE, which was the resolution that Apple adopted authorizing John Lennon to enter into a license on behalf of Apple with Big Seven, the terms of that resolution varied materially from the terms that Mr. Levy and his companies were entitled to under the stipulations agreement of 1973, the one before your Honor.

As your Honor will recall, I'm sure, two principal differences were there: First, there was no specific term in the October '73 settlement as to how long the license would be for, and as the defendants' own cases showed earlier when they were trying to argue a statute of frauds point, the courts have interpreted the failure to specify a duration as meaning that the duration is to be for the balance of the copyright.

The resolution authorized Lennon only to enter

into an agreement that would defer a ten-year term. That in itself would indicate there could be no compliance. Ten years is certainly shorter than the expiration of the copyright lifetime.

THE COURT: Did Mr. Levy object to that? Look, you can't tell me -- let's get out -- let's get into some realm of reality.

If Mr. Levy had wanted to have those songs, there is no indication that any way in world -- that there is any way in the world that he would have, you know, that -- that there couldn't have been some satisfactory arrangement for him to get those songs. He never tried. He wrote back and said, "I don't want to proceed."

MR. KANZER: Mr. Levy, I agree, wrote the letter of January 9th in which he said that --

THE COURT: It wasn't because it was -- the letter came a day late, it wasn't because he thought lurking down in the Beatles' termination agreement there was inadequate time span, it had nothing to do with any of that.

MR. KANZER: That I agree with your Honor, it had to do with Mr. Levy and his company's believing a state of facts and state of law to be the case, which your Honor found to be contrary to what --

THE COURT: I held he didn't so believe.

Look, Mr. Kanzer, what you have, it seems to me, is a letter written December 31st -- I don't have the letter, I don't have it memorized --

MR. KANZER: I have it if you want to refer to it.

THE COURT: Okay.

MR. KANZER: It is Exhibit 31 and I have it, your Honor.

THE COURT: Where is the January 9th letter?

MR. KANZER: 31 is January 9th.

THE COURT: It seems to me what you have is the letter from Lennon's attorney saying that a group of songs were available from which Levy could select three. That was -- I would think that, you know, if the parties had been working towards consummating this, that would have been in fact, practical fact, the initiation of performance, an offer of performance, a tender of performance, whatever you want to say.

MR. KANZER: I would phrase it differently.

THE COURT: Now, if the -- the problem is, after getting Levy's letter of January 9th, Lennon and his attorneys -- what are they supposed to do? Are they supposed to say keep writing him every day and say we

we will tender performance, here are the documents? Are they supposed to shuffle them in when he doesn't want them?

Where did they breach? When was the day when they breached? There was nothing else they could have done.

MR. KANZER: First of all, as your Honor noted throughout the entire duration of the trial, you were extremely surprised that nobody chose to respond to Mr. Levy's letter. Nobody did.

THE COURT: I wasn't speaking of this issue.

MR. KANZER: No, but youwere speaking of the fact that it was very surprising that Harold Seider and four different other attorneys, who were connected with Marshall, Bratter, the attorneys for both Mr. Lennon and Apple, never saw fit to have any sort of response to that letter at all.

Certainly I would have assume, and I'm not going to reargue the questions your Honor earlier decided in this case, that if they regarded this as utter nonsense, the position Mr. Levy had taken, they might have at least so indicated.

If they wanted to cover themselves, they could have certainly done so.

We are dealing, after all, with a party who had four sets of attorneys taking a look at that letter.

I think that the only time it comes up whether or not --

THE COURT: It says, "Please adjust your records to indicate that the original stipulation is no longer in effect." That is January 9th.

MR. KANZER: Yes, and your Honor has found that that in fact is not the case, that the agreement is still in effect.

Mr. Seider, the business advisor to Mr. Lennon, testified that in the end of January, on January 30th, I believe, he was firmly of the opinion that the original stipulation still was in effect.

Now, I suggest that this is a situation where it is Mr. Lennon who is trying to have things both ways.

THE COURT: No. Specific performance is one type of remedy essentially for breach of contract. I don't see there is any place that a breach occurred.

Where is the breach?

MR. KANZER: The breach is that if in fact there was no subsequent modification or new agreement that abrogated the stipulation as your Honor as so found, then there was still an outstanding obligation on the part of

Mr. Lennon to tender performance of his portion of the agreement.

He never tendered --

THE COURT: What was he supposed to do?

MR. KANZER: For one thing, I suppose he could simply had his attorneys send a license agreement over to Mr. Levy, which was signed by Lennon on behalf of Apple, simply saying, "Here is your license agreement. If you want to use it, sign it. If you don't, that is your problem."

THE COURT: When you say "I suppose that he could have" --

MR. KANZER: You asked me, your Honor --

THE COURT: That is not a definition of a breach of contract in my book.

MR. KANZER: What is is -- you asked me what more he could have done. If he wanted to comply --

THE COURT: Let me phrase my question differently. What did he fail to do that constituted a breach of contract?

MR. KANZER: He failed to grant a license, or to use his best efforts to cause Apple to grant a license.

MR. BERGEN: May I just respond briefly? That's precisely what Mr. Lennon did do, he used his best

efforts. He got the agreement of Apple. He wrote to Mr. Levy, and Mr. Levy said, "I don't want it." He rejected it flat out.

As your Honor said, what was Mr. Lennon supposed to do then? He has performed. He used his best efforts. Apple agreed. He wrote the letter to Mr. Levy. Mr. Levy said, "I don't want it."

He said, "I've got another deal," which your Honor found that at the time he wrote that letter he not only didn't have but that he had no reason to believe that and didn't believe it.

THE COURT: Let me ask you this, though, Mr. Bergen -- I just wondered about the following, let's suppose that I don't find there was any breach on Mr. Lennon's part, that Mr. Lennon's attorney's letter was sufficient as of that time, and he got rebuffed by Levy. Then we have this litigation.

Again, I say, if I find there has been no breach, yet we have a dispute about the subject raised in Mr. Levy's letter. We have had litigation, and now, after the Court has sorted all this out and come up with findings and conclusions, I have now resolved the dispute.

I have held that there was never an abrogation of the Come Together settlement; that it was, you know,

contrary to Mr. Levy's position. It was also -- it remained in effect.

Now, doesn't it strike you as a little anomalous to say, okay, now that the Court has so held, Mr. Lennon can simply -- you know, all bets are off, not only does Mr. Levy lose the new contract, which he claims to have had, he no longer has any rights under the old contract, which the Court has held was never abrogated?

MR. BERGEN: That isn't anomalous at all, because Mr. Levy waived his rights under that part 2 of the agreement by specifically rejecting Mr. Lennon's license offer that was made to him in the December 31st letter.

The fact that your Honor found that the agreement was not abrogated as of October 8, 1974, I don't really think that makes any difference to what we are -- as to what we are talking about now, because, as far as Mr. Lennon is concerned, there wasn't any new agreement on October 8th or on any other date after that. He operated under the October '73 settlement of the Come Together suit.

The license of a non-Beatle masters from Apple was offered, and Mr. Levy rejected it, for whatever reason, and by rejecting it -- I don't even think you get to the point of whether there is a breach.

The real point is that Mr. Levy -- Mr. Lennon complied with the agreement and Mr. Levy rejected it and waived his rights under the agreement.

I think that's why he's not entitled to specific performance.

THE COURT: You say it was an intentional, wilful act in January 9th --

MR. BERGEN: I don't see how you can interpret that letter any other way.

THE COURT: We have to wind this up.

MR. KANZER: May I respond quickly on this? First of all, as we pointed out in our brief to your Honor of April 23rd, on page 5, the New York State law we quote -- cite a Court of Appeals and subsequent cases, clearly says that only a valid tender of performance satisfies the obligations of an obligor under a contract, and that a valid tender requires not only readiness and ability to perform, but actual production of a thing to be delivered.

The cases we cite are all ones where in fact full production or full tender didn't occur.

Further, we have cases that say that a waiver has to be unequivocal.

Now, what you are talking about now is whether

Mr. Levy intended on behalf of his company, Big Seven, to waive rights, and the answer is clearly no, he didn't.

THE COURT: I guess -- I don't think waiver is the thing that would be applicable.

MR. KANZER: If he didn't waive it, your Honor, and the contract is not abrogated, he's still entitled to performance.

THE COURT: No. The thing that -- the question in my mind is not really about waiver, it's about this, whether there was an intentional preventing of performance.

He might have -- a waiver really is, you know -- I will knowingly relinquish my right to have somebody perform, that is a waiver.

Here -- I don't know that that was Mr. Levy's state of mind, but perhaps something else was his state of mind, that he was attempting to get a new arrangement and therefore wilfully and knowingly, in his strategy, prevented the performance of the old arrangement.

If you prevent somebody from performing, how do you go and sue him for specific performance?

MR. KANZER: Well, your Honor, let me ask for some clarification. If your Honor is going to take the position that we are not entitled to damages, we are not entitled to specific performance, but the agreement has

not been abrogated and we didn't waive our rights under it, but merely up until now John Lennon has no duties under it because we in some way frustrated his attempt to perform, I would assume that that would mean if we at this point have our client put Mr. Lennon on formal notice, as I will in fact do right now through the record here, that we are calling for full performance under the agreement, that we will not obstruct it in any way, and that we demand that we now have a license issued to us --

THE COURT: Don't use my courtroom for that.

MR. KANZER: Then I will do it in a separate letter to counsel.

THE COURT: Do that after the judgment.

MR. KANZER: We will probably be back in court.

THE COURT: Have a new lawsuit.

MR. KANZER: It may require a new lawsuit. I question whether that in fact is a sensible way of administering justice to do it that way.

THE COURT: Let's be a little more precise. As we have talked, I realize thatwe were using a lot of loose language.

I don't know whether -- please don't -- first of all, I wouldn't purport to decide what -- on the issues that would arise if Mr. Levy now gave notice to Mr. Lennon

that he wanted performance of phase 2. That is premature for me to decide.

I don't want anything I have said here today to be taken as indicating some view of that, and particularly I don't want to be misinterpreted as saying that the contract is still in effect or anything like that to indicate that somebody still has rights to performance.

If I said anything like that, I was not addressing that subject and I think I ought to get more precise and indicate that all that I really have held is that Lennon didn't abrogate that Come Together agreement; that he may have failed to perform some phases of it, but I don't think I ever -- but -- at least as of the October 8, 1974 conference.

What I am really holding is that Lennon never made a new contract, never abrogated the old contract, and therefore Levy had no right as of that moment to do such a thing.

Now, whether any part of that contract remained in executory state remained to be performed after the events of December and January, 1974 and '75, I don't have to hold. I don't have to hold -- particularly do I not have to hold for the sake of this lawsuit whether there is some right of performance existing as of today, and I

don't hold on that question, and I don't want anything I say to be construed as a holding on that question.

MR. KANZER: May I respectfully note, your Honor, that the very -- assuming your Honor is going to award Big Seven damages for breach of the first part of the October 1973 settlement, I don't understand on what theory you could be doing it unless you find that that agreement is still in full force and effect.

THE COURT: On this ground, that there are events that constitute breaches, and I may hold that there was a breach by Lennon at the time he issued the Walls and Bridges record. That might be an event of breach.

I might hold that there was a breach by Lennon at the time he put out the Come Together settlement in failing to put on the -- put on the third song.

But that doesn't mean that there was a breach by Lennon in doing -- in failing to do something else. The contract had different phases.

Just because John Lennon may have breached the contract -- I mean, I haven't held that, but if I hold that, I just think it ought to be clear that if I hold that he breached phase 1, it doesn't follow at all that he breached phase 2. It is just as simple as that.

MR. KANZER: I agree it does not follow that he breached phase 2. It does follow that the stipulation is still in effect.

THE COURT: No, it doesn't.

Thank you all very much.

MR. BERGEN: Since this is the last day, I would like to thank the Court for its patience and consideration through a very lengthy trial, and I would also like to thank the court reporter for staying after six tonight.

THE COURT: Good night.

(Time noted: 6:00 p.m.)

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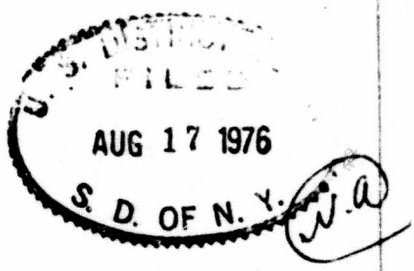
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(187)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



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BIG SEVEN MUSIC CORP. and ADAM VIII, LTD.,

Plaintiffs,

- against -

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC., and EMI RECORDS LIMITED,

Defendants

and

MORRIS LEVY,

Additional Defendant on Counterclaim

75 Civ 1116 (TPG)

----------X

New York, N. Y.
June 29, 1976

B e f o r e:

HON. THOMAS P. GRIESA,

District Judge

Appearances:

WALTER, CONSTON, SCHURTMAN & GUMPEL, P.C.
Attorneys for Plaintiffs
BY: ALAN KANZER, Esq.

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, Esqs.
Attorneys for Defendants
BY: JAMES M. BERGEN, Esq.

(187)

THE COURT: Thanks for coming in. In working on a decision, a thought came to me which I think I indicated in my memo to you yesterday. And I got to it in a somewhat roundabout way. I guess I got to it this way, and I will try to describe it to you.

First of all, I am reasonably pursuaded now that the so-called next record is the "Rock and Roll" record, and I won't try to have reargument on that. We talked about that at great length before.

That would mean that the only breach as far as Phase 1 of the settlement would be the failure to include a third song. There was a lot of proof, and rather difficult proof, to really assess regarding this so-called enhancement of the copyright. One of the reasons it is very difficult is that there are so many unknowns. "Angel Baby" was a possible song, but there might have been other songs, at least under the terms of the contract. There are a lot of variables. The question of whether someone would have put out the third song as a single is a variable.

One reason there are so many unknowns -- and of course this gets right back to the alleged breach -- is that the song was never included. And I began to think: Why wasn't the song included? "Angel Baby" had been recorded, it was being worked on, and why wasn't it included? Why are

we involved in all this difficult assessment of damages? And I began to wonder whose fault it was, really, that it was not included. It certainly was among the songs recorded as of February 1975.

Then I began to think, Well, the evidence is pretty clear that the song was not of acceptable quality. We played it in Court, everybody was wincing, at least we played the Roots album version, and the different elements are not in tune with each other. It is bad. The testimony backs that up that it was not of acceptable quality.

Certainly one would not say that Lennon was obligated to put on a song that was not of acceptable quality. So the next link in the reasoning would be that: What was Lennon, when he found that the quality was not acceptable, obliged to do, if anything? If he was to include "Angel Baby," he would have to do something about "Angel Baby," presumably. Either he would have to change it by engineering or he would have to rerecord it.

Nobody went into this in Court specifically as to what he would need to do, whether it could be changed and made acceptable by engineering adjustments or whether he would really need to rerecord it. If he would need to rerecord it, there was a question of time. He was rushing to get this thing through because of the competing Levy album.

You have got, it seems to me, to look at that situation in the setting which existed, which was that Levy on January 9 had sent a letter saying that the settlement agreement is no longer of any effect. Well, would you expect Lennon to stop the wheels of production and rerecord "Angel Baby" or record another third song, in view of the fact that Levy had written and said the stipulation was of no effect?

I am trying summarize, in a way, a line of thinking that came to me, and that is really whether at that point, in view of all the circumstances, Lennon was under an obligation to put a third song on that album. It seems to me it would have been rather contrary to human nature to have Lennon say to himself, Oh, well, I now have a contract with Morris Levy, I have got to have a third song, let's go and halt and stop and fix it up or rerecord it. Why would one do that, in view of the fact that Levy had written a letter saying, "Forget it"?

I don't know how you would phrase it in legalistic terms, I don't know the exact theory, but I must say this question is bothering me a lot, and I wanted to pose it to you.

I will turn to you, Mr. Bergen, first.

MR. BERGEN: Your Honor, during Mr.Lennon's direct testimony at page, I think he started around 917 and 918 and

919, he talked about the things that he tried to do with respect to the "Angel Baby" in order to salvage it. He mentioned now he was trying to eliminate the worst bits of everything. He said, "I was chopping lumps out of this song to try to pull it all down." And he said, "I finally gave up and took the weakest tracksoff, or what I felt was the weakest tracks." And then the question was:

"What were those tracks?"

He responded: "Angel Baby" and "Be My Baby," and then he went into the conversation with Mr. Seider.

I think the last item in that area was, on page 919, where he said, "I still tried to show the 'Angel Baby' because it belonged to Morris."

I think what we are talking about here is the kind of a --

THE COURT: What are the pages?

MR. BERGEN: It starts at 917, but he really gets into it at 918 and 919.

THE COURT: That is the testimony. What about this theory? This is obviously something that I am suggesting that is in your favor, but I still need your comment on it, because I don't think you want me to commit error as a matter of law, and I don't want to commit error.

MR. BERGEN: No, I don't. Certainly I don't. I

think this ties in with some kind of an estoppe heory. I have been trying to think since last night when we got your letter, your memo, what we are really talking about. You recall we moved several months ago to dismiss this claim on the grounds of judicial estoppel, and our theory was that the plaintiffs throughout this case, throughout the trial, had taken the position that they had a completely new deal. There are just reams of testimony on that point. On October 8, 1974, we entered into a new deal that superseded the come-together settlement. And on January 9, 1975, I told Lennon's attorney that I had a new deal and I said, "Please adjust your records to indicate that the original stipulation is no longer of any effect." And our motion was that, having lost that and your Honor having found (1) not only that there was no contract and (2) in your second opinion, on the counterclaims, that Levy never even had any reason to believe that he had a contract, that they cannot shift horses in mid-stream and come around and say, "Well, all right" --

THE COURT: I am gettirg back to the scene at that time. There was a contract made October 1973. We have a letter from Levy, January 9, saying, "That contract is out. It is no longer of any effect." Does that relieve the other party, Lennon here, from performir I would have thought

it would, although I don't think the law is all that easy. In other words, if one party says, "Don't perform, you don't need to perform," I don't know that there is any automatic excuse for not performing, unless there is a novation or something.

But what occurs to me here is that if Levy's acts, if Levy's letter, combined with his acts -- and I am talking about his putting out the competing album, which made it necessary for Lennon to act quickly -- now, maybe there is something almost akin to impossibility. In other words, Lennon has to choose to either put on an unacceptable record or else take time -- no, not a record -- he had to choose either to put on an unacceptable track or take time to rerecord. The first choice was impossible. You would not expect him to do that. He had no obligation to do that, surely.

The second choice would have been all fine if there was plenty of time. But there was not plenty of time. The reason there was not plenty of time was Levy's fault. So maybe there is something like impossibility.

I don't know, I think obviously the main target of my remarks is Levy's side, but I want to check with you sufficiently to know whether you -- and I am speaking to you, Mr. Bergen -- feel that this would be an erroneous

holding or not. It is just something that has developed in my mind on the basis of the facts.

MR. BERGEN: Since we had the argument at the end of May, and in reviewing the transcript of that argument, I think it was a couple of weeks ago, I think this line of reasoning really flows from the discussion we had right towards the tail end of the final argument, about the Part 2 of the settlement.

You recall that, you know, Lennon's attorneys wrote the letter offering the non-Beatle Masters to be licensed, and the response from Levy was, "Well, I don't want that. I've got a new deal." And on May 28 your Honor said, "Well, what was Lennon supposed to do at that point? Walk over there and hand them the licenses or force them on?" He had been told that he did not want them.

So Mr. Levy adopted a position, for whatever reason it was, strategic or otherwise, that he made it impossible for Lennon to perform that part of the contract. I think the same reasoning flows from that with respect to the first part, really. Once you arrive at the decision that "Rock and Roll" was supposed to be the next album, it was purely no breach when "Walls and Bridges" came out. Lennon put "Rock and Roll" aside, he recorded "Walls and Bridges", he went right back in after he finished that and started

"Rock and Roll" again. So there could not be a breach of the first part of the come-together settlement until something happened and Lennon released "Rock and Roll" with no songs on it or one song on it or two songs on it. But by that point Levy had already taken his position on the January 9 letter that we have got a new deal. He then announced on the 30th to Mr. Seider that he was going to put out the album. Capitol immediately went into a panic about either finding out what the facts were and then decided to put out their album in order to compete with Levy. On February 5 or 4, Lennon was told, "Go into the studio, the Masters studio, and finish the album, we have got to get it out as fast as possible."

It was then that Lennon was faced with the situation, "Do I leave 'Angel Baby' and leave 'Be My Baby' or take it out of it?" There were two songs. It wasn't just Levy's that was singled out to be eliminated from the album. There were two songs that Lennon thought were terrible, and there is testimony in the record to demonstrate that those songs were bad.

So it was Levy's acts, first the January 9 letter and secondly by putting out the album and forcing Capitol to put out their album, that made it impossible for Lennon to do anything but eliminate the song.

There is no testimony -- I looked at the record last night and this morning -- there is no testimony about: Would he rerecord "Angel Baby"? That would have been the purest speculation, because at that point, you know, time was running and the whole idea was to get the album together and out as fast as possible.

It was finally released, I think it was, February 13.

THE COURT: Let me turn to you, Mr. Kanzer.

MR. KANZER: Well, your Honor --

THE COURT: Have you had time to think about these things overnight?

MR. KANZER: In the brief time available I have tried to do so, your Honor. I do appreciate your starting this session by giving an outline of your thoughts, because it has put it better in my own framework. I would like to start by noting, of course, that we do not accept the initial reference that the next album was a reference to "Rock and Roll." I am not going to argue it. I just want to make sure that it is understood.

THE COURT: Right.

MR. KANZER: I also have a good deal of difficulty with each of the three premises that I think your Honor is acting under -- or I should not say "acting" -- is

introducing.

First, that it was Mr. Levy's fault that there was time pressure. Before I speak about that, however, a closely weighted concept, namely the quality of the recording, let me get out of the way immediately. We do not challenge Mr. Lennon's right to decide whether a particular track is acceptable or unacceptable. That is without doubt his choice. Whether we agree with it or not, it is his choice. However, of course, the original 1973 settlement talked in terms of there being three Big Seven songs recorded on its next album. While it did mention "Angel Baby" as one of the possible songs, "Angel Baby" was not a required song, as the Court, I am sure, remembers. It was provided to be --

THE COURT: The point is that if nothing abnormal had occurred, if the album had been -- let us suppose the best of all possible worlds -- if "Rock and Roll" had been recorded, there had been no interference with the Spector recording sessions, and if things had gone along, I don't think there would be any question but that Lennon would have had an obligation to have three Big Seven songs on there, and it would have been his job to get the recordings acceptable. If it did not turn out the first time, he would have to do it the second time or the third time or the fourth time to get an acceptable version of three Big Seven songs

to put on that album. That goes without saying, practically. But things did not go along in normal course, and the particular circumstances I am thinking of are the circumstances which existed as of early February 1975.

MR. KANZER: Your Honor, may I suggest that --

THE COURT: And the thing is, again, if there had been another two months or there had been six weeks or whatever, if Lennon did not like the version of the taping of "Angel Baby" as then recorded, it was his job to do it differently, or engineer it, or rerecord it, or whatever. No question about any of that.

The only thing is that I have in my own mind, in trying to focus very precisely on those events, the thought: Was Lennon obligated under the circumstances that existed to rerecord or to do whatever is necessary to get a third song in shape? That is the question.

MR. KANZER: Your Honor, my problem again is, I think you are choosing the wrong time frame. I think that it is not correct to look to what the circumstances are in February. Let us review, if I may, very briefly what the time sequence was to try to give our version of what the real circumstances were.

Aside from the question of the fact that Mr. Lennon did have from October of 1973 until sometime in

February of 1975 to record those three songs, and forgetting the fact that there was the problem of Phil Spector, the fact is that Mr. Lennon was in possession of Phil Spector tapes, even in July of 1974 -- it's not quite clear which tracks he got back at which point -- but on those tracks, certainly by August of 1974, were all three of the songs, the Big Seven songs, that ultimately were released.

If your Honor looks to, I think this is, Exhibit 24, which is the schedule of what songs were "in the can," you will see that all three of "Angel Baby," "Ya Ya," and "You Can't Catch Me" were on the Phil Spector tapes.

So Mr. Lennon, who says that he listened to these tapes from July until sometime in October of 1974, knew at that time what they sounded like in that version.

Mr. Lennon went back to the recording studio in October of 1974. He brought in instrumentalists, he brought in musicians. If he did not like the way those three songs sounded, he could have been making changes back in October of 1974. For all I know, he did make changes in all three of those songs. Unfortunately, that is not clear from the record, but certainly he had the opportunity at that time.

Mr. Lennon delivered or caused to be delivered what he has called a rough mix tape in November of 1974, which included all of the tracks that were ultimately

released on the Roots album. That again was November of 1974, and your Honor just pointed out that Mr. Lennon had six weeks, for example. Well, that would have been plenty of time to take the opportunity and give him the opportunity to cure any song that he did not feel met his artistic needs.

He had already completed everything but the last-minute mixing by November of 1974. That I submit was almost three months before "Rock and Roll" was ultimately released. Certainly he could have made his decision at that point and cured.

Again, the statement of uncontested facts submitted by the defendants -- that is the defendants' statement, not ours, your Honor -- states that in December of 1974 Mr. Lennon listened again to the recordings that he had made. Again, December was two months, two full months, before that album was released. Again, Mr. Lennon listened to "Angel Baby" at that time. If he did not like "Angel Baby," why didn't he do something about it then? Did he really have to wait until the time he entered into the mixing room at the very last moment to do it?

We get to a situation where your Honor has brought up the January 9 letter, and I will shortly be happy to deal with the question of its legal import. But let us for the moment think of it in terms of a factual analysis, in terms

of our chronology that we are talking about.

Your Honor may recall that earlier during the trial you expressed great surprise that no response was given to that January 9 letter from Mr. Levy, plaintiffs' Exhibit 31. I think your Honor -- and I did not have a chance to check back into the records to find the pages last night -- I do recall, however, that you said that when you were in private practice if one of your clients had received a letter like that and you had confirmed that in fact the statements that a new deal had been made were untrue, you would immediately have called your secretary into your office, dictated a letter and had it go out forthwith to put the other side on notice that was not true at all.

Mr. Lennon, of course, although, as we see from Mr. Seider's copy of that letter, that letter was reviewed by four different attorneys of the law firm of Marshall, Bratter, plus Mr. Seider, who in addition to being a business adviser also was an attorney of great experience in the music industry. None of them apparently did anything with respect to that letter. In fact, as your Honor may recall expressing surprise, nobody even brought it to Capitol's attention.

Certainly whatever doubts there may have been prior to the January 9 letter as to what Mr. Levy and his company's intentions were, that letter, I submit, removed all doubt.

Mr. Levy understood he had a deal and was planning to act upon it. He was planning to release an album.

Mr. Lennon, if I may use an analogy from the field of tort litigation, seems to be almost in a situation the way your Honor is describing it as a pedestrian who is walking across the street against the light in the middle of the street, not looking to his left or right, and by the time he sees a car bearing down on him he says, "I didn't have an opportunity to do anything about it."

Mr. Lennon puts himself in a situation, even assuming one is willing, which I am not, to assume that in February of 1975 there was nothing that Mr. Lennon could have done to cure the problem, Mr. Lennon was the prime person to cause the problem.

You observed earlier Mr. Levy never tried to keep secret what his intentions were. He told anybody who would listen to him. He was going around proudly telling everybody he knew that he had made the steal with John Lennon. John Lennon was aware of it, Harold Seider was aware of it. You may recall Harold Seider told one of the business advisers of another who told him, "I hear John Lennon may be making this recording." All of that is not true. Again, he was certainly on notice. Why, if one is concerned with the fact that Capitol had to put this album

under a rush, put the album out under a rush, it is quite clear the fault was not Levy's, the fault was Lennon's and Seider's,and Seider, of course, was acting as his --

THE COURT: I have already gone through that.

MR. KANZER: Your Honor, you went through it from the standpoint of mitigation. I am doing it now from the standpoint of whether John Lennon put himself in a situation where he could not possibly cure. And I think that is a different question.

THE COURT: That is helpful. I have to think about all this. In other words, your position would be that there was plenty of opportunity.

MR. KANZER: From back as far as July 1974, certainly by January 9.

You mentioned six weeks. It turned out it is five weeks, or approximately -- maybe it is even six weeks, I don't have a calendar in front of me -- from January 9, when Mr. Levy wrote his letter, to February 13, when Capitol ultimately released the album. Again, did Mr. Lennon have to wait until February of 1975 to begin thinking about whether he liked his version of that song "Angel Baby"? He had plenty of opportunity to think about it.

THE COURT: Lennon, it seems to me, can take his own steps according to his own lights about listening,

editing. He apparently does some work, and then he lets it sit, and he takes it up again.

The work on the album was not finished as of January 9 , and he was under no obligation to finish it. There was no deadline that says he is supposed to have finished with his work on or before January 9.

I am not convinced that the January 9 letter is of just no effect. At some point before the completion of that work, Levy interjects his January 9 letter. Is Lennon under the same obligation after that letter as he was before?

MR. KANZER: I think so. And I would be happy to address myself to that either now or to continue with my chronology which I had not finished, whichever you prefer.

THE COURT: Why don't you speak of this.

MR. KANZER: The January 9 letter?

THE COURT: Yes, right.

MR. KANZER: All right. As to the January 9 letter, first of all the Court did find in its first opinion on the question of whether there was a contract that in fact the agreement had not been abrogated. I refer the Court to page 23 of its opinion in February 1976.

Aside from the question of whether the agreement was abrogated by consent -- and I think the phrase, and I don't have it in front of me right now, is that there is no

agreement to abrogate the agreement -- aside from the question of whether it was abrogated by consent, one can then go to the question "Was it abrogated by in effect a waiver of one party?" Did Mr. Levy waive his rights? Incidentally, I don't really mean Mr. Levy. Did his companies waive their rights under that 1973 settlement by this letter?

I think that we are really back to some rather basic rules of contract law, and they are, among others, first that you do not read a statement out of context. Mr. Levy did not in the middle of a letter asking for autographs or commenting on the weather say, "By the way, I am waiving my rights under the 1973 settlement." Far from it. Perhaps if he had been well advised and had a lawyer who wrote the letter for him, he would have couched it in better language. He was clearly trying to say, "It's my understanding that we have a superseding agreement that has replaced the 1973 agreement, and here are its terms: (1) that I have worldwide rights; (2) that Mr. Lennon is going to record this album for me and, among other things, that the 1973 agreement will no longer be in force."

He was not stating he was waiving.

THE COURT: What is someone supposed to do when they read that letter? Are they supposed to move exactly as they did before?

MR. KANZER: One thing I might respectfully suggest they do is in fact if Mr. Levy were misstating what the facts were, one would assume that among five attorneys reviewing it somebody might have gotten the idea it would have been helpful to reply.

I also suggest, your Honor, that I suspect that any attorney who is reasonably prudent -- and I am more than willing to assume that the people at Marshall, Bratter who were reviewing this are skilled attorneys who have been dealing in contract law for some time -- I would suspect they would have been very, shall I say, imprudent if they were to have told John Lennon at that time, "John, you don't have any further problems."

THE COURT: There is no evidence that they did that.

MR. KANZER: No, and I don't think any responsible attorney would have said at that point, "You are relieved of responsibility. Mr. Levy has waived, because" --

THE COURT: The question is, things don't happen in a vacuum. If you are John Lennon and you are proceeding-- Lennon knew about the January 9 letter. Capitol did not, by the way. But didn't Lennon?

MR. BERGEN: No, I don't think there was testimony that he did know.

Your Honor, on the January 9 letter, Mr. Seider testified that he told Mr. Levy in a telephone conversation on January 6 or 7 or maybe it was even the 9th, "When Mr. Levy told me, 'I am going to write a letter,'" he said, "You know, we don't have a deal, Morris. Go ahead and write your letter."

We talked at great length about whether Capitol knew of the January 9 letter. That was in connection with the claim that Capitol suddenly at the end of January learned of Levy's intentions and then had to act in great haste and you went into that. But I don't think we had any particular reason to worry about this question.

Did Lennon know about the January 9 letter?

MR. BERGEN: I think there was some testimony. I think we went into it quickly and I don't think John remembers whether he had been told about the letter or not. I do recall that he was very surprised, he testified that he was surprised when he got the message through May Pang. You recall that testimony on January 30, that Levy was going to put out the album. Because when Mr. Seider went from Mr. Levy's office and met Mr. Lennon, he said, "Morris is going to put out the album," and John's response was, "Yes, I know, we just got a message -- I just got a message through May Pang."

I don't think John recalled whether one way or another he had been told about this letter.

May I just add one other thing, your Honor: When Mr. Kanzer goes through this time sequence back in November, as your Honor just said, Mr. Lennon testified in great detail in response to questions from your Honor. And I think you asked me to go into this, what happened. You asked me to inquire of Mr. Lennon, "What happened between the middle of November, when you kind of finished the recording session, and February?" And Mr. Lennon went into great detail about how he had promised Elton Johns that he would appear in a concert on Thanksgiving night in Madison Square Garden, New York, and that a few days before that he went to Boston because he had not been on the stage in years, to see what would happen. Mr. McCartney, Paul McCartney, another member of the Beatles, then came into town. He visited with McCartney. George Harrison came into town for his concert just before Christmas. Mr. Lennon then went to Florida, coming back around the end of December.

One other point. When Mr. Kanzer says that the seven and a half tape that was given to Mr. Levy included all the tracks to be delivered, Mr. Lennon's testimony was very clear that that was not finished. In fact, there was one thing that he had planned to do since October of 1973

to "You Can't Catch Me" that he did not do at the time that he was in the studio in October and November of 1974, and he testified unequivocally that he had planned to do that all along at the last minute. That was taking the first fifty seconds and reinserting it.

THE COURT: I am very badly stacked up today, and there is a case that I was trying to finish this morning that is not finished. But I wanted to get you in and get your positions. I think I know Mr. Bergen's position. I think I get your position about the chronology.

MR. KANZER: I would like about five to ten more minutes, your Honor, at least on the question of liability. As to damages it is just a matter of doing certain calculations, which I think the Court is well aware of.

First, to follow up on the point you were asking Mr. Bergen: I cannot recall and did not have an opportunity in the short time to go through the testimony to see whether Mr. Lennon was asked this precise question of whether he personally knew of the January 9 letter. But Mr. Lennon, in any event, chose to do business through his attorneys and his advisers, and they certainly were on notice. Again, it cannot be Mr. Levy's responsibility if the person who writes to him that causes him to write the letter back, namely, Mr. Dolgenos, did not pass the information on,

particularly since Mr. Levy also brought it to Mr. Seider's attorney.

THE COURT: As a matter of fact, if Levy writes Lennon's attorneys and says that the settlement agreement is no longer of any effect, the question in my mind is, what does that do? I think we have got to be very, very careful and precise.

MR. KANZER: May I direct the Court's attention to a case which was brought to my attention this morning. I have not had a chance to read it carefully myself. It is American Broadcasting Paramount Theaters, Inc. v. American Manufacturers Mutual Insurance Company. It is a State Supreme Court, New York County, 1965 decision.

THE COURT: What is the cit.?

MR. KANZER: 48 Misc. 2d 397 and 265 N.Y.S. 2d 76. There the Court, which was dealing with an analogous question of whether ABC had waived certain rights against an advertiser, said: "Unless there" -- and I am quoting from 265 at 84; I don't have the original cit.

THE COURT: All right. Surely.

MR. KANZER: "Unless there is explicit language showing such an understanding by the parties" -- namely, an understanding to release or forgive -- "it will not be implied from one ambiguous statement. A release of an

obligation must be clearly and unequivocally expressed and understood as something being given up by an obligee."

Similarly, at page 85, the Court quotes from 6 Williston on Contracts, Section 1847, where it is stated: "It is generally more reasonable to suppose that (a creditor) bound himself to surrender his own rights only when a new contract of accord was performed."

I suggest that is exactly what Mr. Levy was trying to express, namely, that he thought they had a deal. Assuming that deal was in fact carried out, then of course Mr. Lennon no longer had his obligations under the earlier agreement. And I respectfully suggest that is just what Mr. Lennon and M Seider thought.

May I remind the Court that Mr. Seider was asked the question "What was your view on January 30, 1975, as to whether there was a contract?" Let me read the exact question, so there is no confusion. This is from page 2138 of the trial transcript. This is, I think, a question by Mr. Schurtman.

THE COURT: What is the page?

MR. KANZER: 2138.

"Did you think. after January 30, that the come-together settlement was still in effect, or did you think it had been abrogated?"

"Mr. Grumbach: By whom?

"Mr. Bergen: Objection.

"The Court: I will overrule the objection.

"A I thought it was still in effect."

Also Mr. Seider testified that when he was asked by Mr. Lennon whether he could delete "Angel Baby" from that recording, his answer was: "Do whatever you think is artistically proper." Then he was asked, "Well, were you thinking in terms of the January 9 letter or the settlement?" The answer was: "No, never even crossed my mind."

The decision, in other words --

THE COURT: Do you have a cit. on that?

MR. KANZER: I think I can find that for your Honor. What I am suggesting, your Honor, is the decision -- I think it is at 1296 but let me see if I can find it --

MR. KANZER: The point I am suggesting, your Honor, is the decision to delete certain of the material was not done because of that January 9 letter. It was a decision based rather on the feeling that nobody paid any attention to the settlement, the same way as I am afraid was also the case when "Walls and Bridges" was being released, you may recall, your Honor, Mr. Graham said: "It never even occurred to him" and Seider said it never occurred to them whether there was any need to include "Ya Ya" or whether "Ya Ya"

was being submitted in conformance with the settlement. These people, your Honor, ignored that settlement from the beginning to the end.

THE COURT: I have been very sensitive to all those things, and I have really on my own hook brought those problems up. I think I am forced to recognize that in this whole picture there was the action of Levy. I can criticize Seider and Lennon for this and that, but there is the fact that Levy was putting out, at least under my finding, an unauthorized album.

That has an influence on people's conduct. I can be as critical as all get-out of Seider and Lennon for not answering letters or complaining about positions or this or that, but if Levy is going to put out a competing album, that is a powerful fact in influencing people's conduct. You cannot just sort of assume that everything was going along as if it did not happen. It was there.

MR. KANZER: I quite agree it was there, your Honor, but may I make two responses to that: First, to use a hypothetical, let us assume that what had happened was instead of Mr. Levy coming out with a rival album, he were to have done something that tremendously irritated and antagonized Mr. Lennon. Let us assume Mr. Levy, for whatever reason, told everybody he knew scurrilous and vicious

statements about Mr. Lennon and his artistic ability. Lennon at that point may have had, let us say, an absolutely good action against Mr. Levy for libel and slander. Would that have given him a right to --

THE COURT: That is a little different case.

MR. KANZER: Well, the idea I am trying to bring to mind is the fact that the party may have engaged in some misconduct, which we don't concede but the Court has found, does not give somebody else a justification for breaching an agreement. This was not a bilateral agreement, your Honor. The 1973 agreement, if I may suggest, was a unilateral one, at least Phase 1 was. Mr. Levy had no obligations.

THE COURT: The only performance left was on the part of Lennon.

MR. KANZER: Exactly. So it is not a situation, for example, where a seller delivers to a buyer goods that are of inferior quality and thereby breaches the agreement relieving the seller of his obligation to perform. That is not what occurred. Any misperformance by Mr. Levy or his companies had nothing to do with John Lennon's actual performance. It was an independent action. Mr. Lennon, if he chose to retaliate, which I am not suggesting he could not -- Justice Holmes said a long time ago, and I sorry I don't have the cit. for it, if one chooses to violate one's

contract, you are free to do so, but you have to pay the damages.

THE COURT: Both of you have been helpful and I have pretty well got this in mind. I am badly stuck on time.

MR. BERGEN: Your Honor, one point --

THE COURT: Wait a minute. The exhibits in the record on the calculation of damages are a little hard to deal with, particularly if I am going to assume, and I do this over the strenuous objection of Mr. Kanzer, that the next album was "Rock and Roll," I do want to be sure that I am not missing something as far as the calculation of damages.

MR. KANZER: I could review it for you in two minutes, your Honor. I have the figures.

On the assumption that it would have appeared on "Rock and Roll," the key exhibit is plaintiffs' Exhibit 302.

THE COURT: Let me see that.

MR. KANZER: 302, if you look at it, I guess it is Part B.

THE COURT: Right. I have that.

MR. KANZER: It shows that there would have been domestic royalties of $6,840, one missing song. Your Honor has suggested that the writers' share should be omitted, a

conclusion we do not share, but if the Court is going to do that, then I suggest that the number that your Honor would be dealing with would be one-half of that, or $3,420.

THE COURT: It is domestic mechanical royalties.

MR. KANZER: Right. Exclusive of writers' share, with net to $3,420.

THE COURT: All right.

MR. KANZER: The figure that appears on 302, or $16,872, was gross royalties. The backup sheet for that is 303A.

THE COURT: Let me look at that.

Mr. Bergen, I would like to see if you can come to as much agreement on the calculations as we can.

MR. BERGEN: I agree with that so far.

THE COURT: All right. So far.

MR. KANZER: I think the calculations are --

THE COURT: Turning to 303A, and that is all the evidence we have on foreign mechanical royalties out of one song missing from "Rock and Roll." Right?

MR. KANZER: Right.

MR. BERGEN: Correct.

THE COURT: I know there are some adjustments.

MR. KANZER: My recollection is that there was a suggestion there should be a twenty percent deduction,

is that correct?

MR. BERGEN: No, fifty percent deduction.

MR. KANZER: No, I am talking about -- let me complete my sentence. A twenty percent reduction, I think, was suggested by your expert, Mr. Strauss, on the grounds of failing to put in certain types of deductions for costs, etc.

MR. BERGEN: That is correct.

MR. KANZER: All right. If one subtracts twenty percent of the $16,872, that comes to $3,374, which, of course, is $13,498. So net royalties received by Big Seven and its subsidiaries would be $13,498.

THE COURT: All right. Is that OK so far?

MR. BERGEN: Yes, your Honor.

THE COURT: All right.

MR. KANZER: Then, I believe your Honor suggested that you were going to exclude the amount that would be retained by the foreign subsidiaries, although we have suggested that that was not done in the situation at Capitol. However, that would, of course, be one-half, or at least it was, I think, in the last session, when there was an agreement that it would be one-half.

MR. BERGEN: Fifty percent.

THE COURT: We assume one-half.

MR. KANZER: Assume one-half, which would leave $6,749.

THE COURT: All right.

MR. KANZER: Then again we come back to the writers' share, which would be fifty percent that would go to the writers, and if I may round off to the nearest dollar, what we would then have would be $3,375, which would actually be retained by Big Seven.

THE COURT: Under those various theories.

MR. KANZER: Under those various premises, which, of course, we do not accept.

THE COURT: I take it that if we got to the --

MR. KANZER: If you then added the two together, your Honor, to get total mechanical royalties, namely adding the $3,420 for domestic and the $3,375 for the foreign, you would have $6,795, which would be total royalties on the particular number of albums sold. Of course, we do take the position there may be future sales, and this also, just very briefly, since in Part 2 of your question you ask about the inpact on damages --

THE COURT: What I wanted to get, and I did not express it clearly, is that I wanted to get the type of calculation you have gone through.

Let me ask you, Mr. Bergen: If I were to award

damages for one song left out of the "Rock and Roll" album, mechanical royalties, this calculation would be proper, would it not?

MR. BERGEN: Yes.

MR. KANZER: If I made an arithmetical error, I am sure that we will all adjust for it.

THE COURT: All right. I have to cut you all off, but you had one other remark?

MR. BERGEN: I had just one thing I wanted to respond to about the January 9 letter.

First, Mr. Kanzer again says, as the plaintiffs have said on a number of occasions, that on January 9 Mr. Levy thought he had a deal. Your Honor has already found that he not only did not think that but he did not have any reason to believe that.

Secondly, I don't see how the January 9 letter can be read in any way, it is in plain language, that Mr. Levy not only thought he had a new deal but that he was giving up the old deal. It says the October settlement, the October 1973 agreement, was breached. Since that time this entire matter has been resolved during meetings with John Lennon and Harold Seider. In accordance with that agreement, I am going to show it on television. Please adjust your records to indicate that the original stipulation is no

longer of any effect.

Obviously, he knew not only what that language meant but what he was saying.

THE COURT: All right.

MR. KANZER: Your Honor, I don't want to argue further. I just want to say two things. One, I did not mention that the case I mentioned was affirmed ultimately by the Court of Appeals and the ultimate citation of the Court of Appeals, if your Honor wishes it, is 17 N.Y. 2d 849, and 271 N.Y.S.2d 284. The decision was 1966 and cert. was denied at 395 U.S. 931 (1966).

The only other thing -- and this is not on this aspect -- is a procedural matter I would like to raise, if I may, very quickly. I have indicated that it is our intention, following the Court's final opinion, to make a motion to amend the Judge's findings and conclusions. I simply would like to know whether your Honor is going to give us an opportunity to do that before judgment will be entered or not. Obviously, we get into a situation of posting a bond or not posting a bond before the Court decides the motion.

THE COURT: Let me indicate this: I would hope very much to get the decision on this last phase out very quickly, and I won't predict the exact day. I really don't

know what is proper after that. I just don't know. You all will have to consult about that. But the one thing I am thinking of is that I believe that I would like to avoid a lot of voluminous papers and extended briefing. The trouble with the possibility of an extensive written motion to amend findings is that it might become very lengthy, repeat a lot of ground we have covered, reargue, and so forth.

The one thing I am going to insist on is, before any motion is filed, you come in and state what you are going to go into. Maybe we can somehow make sure we don't just rehash a lot of stuff we have gone into before.

MR. KANZER: That is certainly acceptable.

THE COURT: I am sure you will be interested in that.

MR. KANZER: Your Honor, first of all, we do not --

THE COURT: I would like to do this. I am very, very late, I have got some appointments that I have to worry about. But I would be happy to meet with you again, if there is any problem about the timing of the motion or this judgment, and I would just have to do that at a later time. I will try my best to get this decision out very, very shortly. That is the best I can do for you.

MR. KANZER: Thank you, your Honor.

MR. BERGEN: Thank you.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FILED
AUG 17 1976
S. D. OF N. Y.

BIG SEVEN MUSIC CORPORATION, et al.,

Plaintiffs,

vs.

JOHN LENNON, et al.,

Defendants.

75 Civ. 1116 (TPG)

Before:

HON. THOMAS P. GRIESA,
District Judge.

New York, July 23, 1976;
9.00 o'clock a.m.
(Room 706)

APPEARANCES:

WALTER CONSTON SCHURTMAN & GUMPEL, P.C.
Attorneys for plaintiffs and Levy
330 Madison Avenue
New York, New York
BY: ALAN KANZER, Esq.,
Of Counsel.

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, Esqs.,
Attorneys for defendants
John Lennon and Harold Seider
BY: JAMES M. BERGEN, Esq.,
HOWARD P. ROY, Esq.,
Of Counsel.

(188)

CLEARY, GOTTLIEB, STEEN & HAMILSON, Esqs.,
Attorneys for defendant
Apple Records, Inc.
BY: GEORGE J. GRUMBACH, JR., Esq.,
Of Counsel.

HOGAN & HARTSON, Esqs.,
Attorneys for defendants
Capitol Records
BY: E. BARRETT PRETTYMAN, JR., Esq.,
Of Counsel.

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(Case called.)

THE COURT: What applications are there, if any?

MR. PRETTYMAN: Your Honor, perhaps we might proceed best if I went first and told you why we are here.

Actually, because of a meeting of defense counsel this morning, the purpose of our being here is different than the one that we had originally planned when we set this meeting up.

Prior to the time that you had rendered your judgment in the copyright dispute, we had prepared a proposed judgment, subject, of course, to the changes that would result from your decision in that case. However, as soon as that decision was rendered, Mr. Kanzer

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called me and asked, as a favor, that the judgment not be submitted to you because, under the rules, he would then only have ten days to file a motion which he wanted to file to amend the findings of facts and conclusions of law and he said that he needed more time than ten days, despite the fact that he had had since April 26 or some three months to prepare such a motion.

We responded that we were willing to oblige him so long as we were fully and completely protected monetarily doing the expanded period and of course we were concerned about the entry of the judgment because, as you know, it acts as an automatic lien on all of the property which they have in New York.

Mr. Kanzer responded that he wanted to avoid putting up a bond if at all possible because of the expense of doing so and he said that his client had already purchased a substantial amount of U.S. Treasury notes and, between us, we discussed the possibility of an escrow fund with the face value of that fund equal at all times to the amount that the Court had awarded, plus 6 percent, and we attempted to accommodate Mr. Kanzer in this regard even to the point of drawing up a 13-page escrow agrement, which I have with me.

The original purpose of this meeting was to

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discuss that escrow agreement and the various dates for the filing of his motion, and so forth.

However, we immediately ran into what we now find to be simply insurmountable problems and we have concluded at a meeting this morning, prior to this hearing, that the escrow system simply will not work.

THE COURT: Look, I thought the motion was going to be made this motion to amend findings and I don't see that there is any need for any protracted time period to be spent with that motion.

We have really had endless discussion about every conceivable phase of this case.

I do not purport to carry in my mind references to specific points and, obviously, nobody does off the top of their head but, if Mr. Kanzer is prepared to state what amendments to the findings he wishes to have and then, if they are points that have not been covered, we can arrange to cover them in some speedy fashion, either on the spot here today if you are all familiar with the references, or we will have a short adjournment and come back but I think that the motion ought to be handled now or in the very near future and I mean in a matter of days, and the judgment ought to get entered and this case out to be wound up as far as the District Court is con-

cerned and then everybody has their appellate rights and can proceed accordingly.

MR. PRETTYMAN: I was prepared to explain to your Honor why the escrow agreement --

THE COURT: Well, I don't think I want that. I think that that is really up to you. If you can make it, fine and, if you can't, all right. Regardless of that, we are to get this case wound up in the District Court.

MR. PRETTYMAN: We have a proposed judgment for you. We are prepared to submit it to you and we understand you are going on vacation a week from today, I believe it is, and we would hope that the judgment would be entered and we can give it to you now and you can enter it any time during the coming week that you wish.

THE COURT: I shouldn't think the judgment would be any problem. It's a matter of clearing up this jotion.

What points do you want to make in your motion?

MR. KANZER: I believe that I had not been aware that we were actually going to try to cover the specifics today. I understood we were going to discuss the points Mr. Prettyman made and, further, that we would discuss a general outline of what our motion would be.

THE COURT: Now, look, Mr. Kanzer:

You must know what you want to raise and what do you want to raise? Let's get on with it.

MR. KANZER: We are going to raise the question of whether AFM payments should have been taken into account in computing damages for, I believe in this case it would be, both Capitol and Lennon.

We are going to raise the question of whether royalties that were payable to Phil Spector should have been deduced from the amount to be awarded to various of the defendants.

We are going to raise the question as to whether any award should have been granted for sales by EMI of Canada.

THE COURT: For what?

MR. KANZER: Sales by EMI of Canada.

We are going to raise the question of whether the costs that Capitol set forth in I believe it is Exhibit 241-A, Plaintiffs' Exhibit 241-A, are accurate.

We are going to raise the question as to whether TV costs should have been deducted from the award -- that is the savings that Capitol and others realized by not having a TV program should have been taken into account.

We are going to raise the question as to whether the evidence as to the price of certain Adam VIII records that were sold at Jimmy's Record World, was adequate, accurate and properly used in considering the question of what price Capitol should have offered its album.

Those are the main points that we are presently intending to raise.

THE COURT: I don't want the main points. I want all of them.

MR. KANZER: Those are the ones that we presently contemplate.

THE COURT: I want now all the points that you intend to raise on the motion in this District Court, not your intentions as of now.

You have had weeks and months to think about these points. They have nothing to do with the decision that I just rendered. They have nothing to do with it whatever.

MR. KANZER: That's not quite true because, frankly, the Canada one is a direct consequence of the decision that you made on our counterclaims when you excluded from the award to Big Seven the amounts of money that --

THE COURT: That may be an argument but the points you are addressing are the points related to the counterclaim decision that I handed down on April 8.

Now, this is July 23.

MR. KANZER: The only other one --

THE COURT: You have had plenty of time, and I want all the points now and I will not consider any others.

MR. KANZER: The only other one we are presently considering raising, and we have not made a final decision yet, your Honor- -

THE COURT: Well, you make a decision now.

MR. KANZER: -- is whether or not there is proof that in fact John Lennon and Beatle albums are regularly being released by TV mail order which was not brought out in the trial and, in fact, I think is one of the bases for your Honor's conclusion that JOhn Lennon would never have agreed to a TV program.

THE COURT: All right, we will include that as a point.

Okay. Now, some of these sound awfully familiar.

MR. KANZER: I believe the only one --

THE COURT: No. 5, the TV costs, I believe

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we went into.

MR. KANZER: I was going to say that as far as I know that was the only one argued to your Honor. That was argued to you by Mr. Schurtman during the summation on the counterclaim questions.

THE COURT: I will here and now deny your motion as to that point because it has been argued and the purpose of this motion is not to simply review things that we have already done.

I am satisfied on that point, so I will deny your motion on that point.

That leaves us six points.

MR. KANZER: Obviously, your Honor, I agree with your statement that the purpose is not to review everything and that's why we, of course, have not raised a number of issues we plan to raise on appeal.

As to the others, I believe we had mentioned several times, for example, the AFM matter but had never gotten to the point of actually introducing any proof as to it.

THE COURT: I expected that to be raised. I think that that is something that we really held open and I certainly expect that to be raised.

On the Spector royalties, that also sounds

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awfully familiar.

MR. KANZER: We mentioned it during the course of the trial.

We never did into putting in the evidence on that.

THE COURT: What do you mean by that? What stopped you from putting the evidence in?

MR. KANZER: I believe that it was mentioned but no proof was put in as to amounts and we now intend to introduce the contracts that we are talking about and show that that was a saving that would have been realized by Capitol and Lennon by the fact that there was not the additional albums sold.

THE COURT: Now, look, you are moving as to put in new evidence.

MR. KANZER: For findings of fact and conclusions of law, and also we are moving for a new trial, for an opportunity to introduce new evidence and further for an opportunity to get the right to audit certain of Capitol's records because we did not have access to them during the course of the trial and the information had not been given to us prior to the trial.

THE COURT: Now, look here: I can say without further ado that there is no conceivable excuse for

coming forward now, when you have lost and having second thoughts about what proof you want to put in, and that's really what it is.

The matter of the Spector expenses has been in this case from Day One. Phil Spector is one of the first names that I ever heard in connection with this case, aside from the names of the parties.

During the trial on the counterclaims, there was ample opportunity, and that is almost an understatement -- there was ample opportunity to put in whatever evidence you wanted to put in about expenses of Capitol or savings of Capitol due to circumstances that occurred and any and all evidence of that kind.

Your clients rested. You rested on behalf of your cli on those counterclaims.

After the evidence was put in and before my decision, there was some space of days prior to an oral argument.

So, if you had any second thoughts, there was time then to do that. To start talking now about putting additional evidence in, three months after that decision, there just cannot be an excuse for that.

MR. KANZER: Well, your Honor, I believe that the burden of proof in New York is on the person claiming

the damages to prove the amount of the losses so, frankly, that was evidence that should have been introduced by Capitol and by Lennon and we are now supplementing the evidence that they failed to put in.

THE COURT: What do you mean? You want to put in evidence to carry their burden of proof?

MR. KANZER: No. I want to do it to show that they did not in fact introduce that proof.

THE COURT: You could have argued that point. I didn't sit around here, you know -- that was the reason I handed down a decision from the bench, to deal with these problems while this case or that phase of the case was fresh in my mind. That is why I did that.

I prepared to do that as best I could and I wan't kidding around when I used that procedure and so I expected any and all arguments to be made at that time except, of course, situations where you, under the rules of procedure, have a right to a new trial or you have a right to reopen the record and put in new evidence.

There are such situations, we all know that, but I think the record ought to be clearer on the specifics. I am telling you now that the chances of me receiving new arguments and new evidence on the Spector royalties are nil.

You can make your record but I am not going to reserve a lot of time to deal with that point.

Now, the sales by EMI of Canada, I think that that is also something which is foreshadowed by an earlier discussion.

MR. KANZER: I believe we have raised it several times, your Honor.

THE COURT: That's right, and I think in my mind there was a problem about foreign sales. You have indicated all along -- not all along but from the time when I handed down my decision -- in our subsequent discussions you indicated promptly some problem about foreign sales, so I certainly expect you to make that argument.

So, we have the AFM payments question, the EMI of Canada question. Those we will have before us.

What is this about costs in Exhibit 241-A?

MR. KANZER: Your Honor, we never received any costs from Capitol until the day that in fact that exhibit was offered in evidence. It was offered in evidence by us when we asked Capitol for that sheet which, as I say, w as 241-A, I believe.

Now, we have had no opportunity during the course of the trial to have that examed by an expert in

the field. We have subsequently done so and he says that on its face, there are certain costs that awre materially understated and those costs include the cost of the jacket --

THE COURT: What do you mean, you had no opportunity? Did you not have an expert here in court during the trial of those counterclaims?

MR. KANZER: Mr. Zucker is an expert in certain areas of the industry.

THE COURT: Is he an accountant?

MR. KANZER: He is an accountant. An accountant would not be able to tell the fact that the manufacturing costs were understated unless the accountant had the personal knowledge of what the costs of manufacture are in the industry.

THE COURT: Well, did somebody from Capitol put that exhibit in?

MR. KANZER: That exhibit was the basis for your Honor's conclusion --

THE COURT: I am asking you about what happened at the trial. I assume you had a right of cross-examination of somebody.

MR. KANZER: Yes, we did.

THE COURT: Did you exercise that? Did you

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exercise that? Did you cross-examine on that exhibit?

MR. KANZER: We cross-examined on that exhibit without an opportunity, because of the time we received it and the fact that your Honor would not allow us --

THE COURT: Did you ask for a recess?

MR. KANZER: We asked your Honor for a right to audit Capitol's figures and your Honor would not agree to it.

THE COURT: Did you ask for a recess so that you could analyze that particular exhibit?

MR. KANZER: We asked -- we did not ask for a recess for that particular exhibit. We asked for a recess to go to California to audit figures of Capitol and your Honor denied it.

THE COURT: Figures of Capitol on what?

MR. KANZER: I believe it was primarily Canada. I believe, however, if my recollection is correct, and I don't have the reference in front of me now, that we broadened it to say that we wanted to see, we wanted an opportunity to examine all of Capitol's figures.

THE COURT: Now, look, Mr. Kanzer:

Neither of the things that you say answers my question.

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I asked you if you requested an opportunity or a recess for the purpose of better analyzing the cost figures in Exhibit 241-A. That would be a specific request and if you showed a specific need for that, that is something but, if you asked for a recess for some other subject or you asked for a recess in general to audit Capitol's books and records, that's still a third thing.

Did you ask for a recess in order to get an opportunity to better anlyze Exhibit 241-A?

MR. KANZER: I don't recall, your Honor.

THE COURT: All right. I assume you didn't.

Well, I think that this is another thing that we are probably not going to exert much time with in the motion because I think it's something that was part of the trial. We withdrew it.

You are talking about issues that we attempted to deal with at the time.

MR. PRETTYMAN: As I recall it on that, when they asked for that you said that you would seriously consider imposing costs if they were going to go out and do that. We then had a meeting, I believe in the back room, over this very issue and then they dropped it. That's my recollection of it.

MR. BERGEN: That was on April 26, your Honor.

MR. PRETTYMAN: So, they are coming up now with something which they had full opportunity to deal with at the time and decided not to.

THE COURT: All right. I don't remember. The things I am raising now are obviously questions and we don't know the full answers. We have got to look at the record, but I will tell you right now that I am not going to just allow a reopening of this case because of second thoughts.

If the issues were raised and you had an opportunity to probe or rebut or cross-examine or do something at the time, then I am not going to give you another opportunity now at this late date. It just ins't a fair way to proceed.

What about this evidence as to Adam VIII?

MR. KANZER: Oh, I think you are referring to Jimmy's Record World, your Honor. You may recall, your Honor, the background as to that was that during the course of the, I believe, main trial, Mr. Levy was asked to identify certain albums which bore on them a small stamp, a price, and I believe it may have been $2.98, and I don't recall at the moment; that apparently was a sticker that indicated that those particular albums eventually were sold at Jimmy's Record World at a discounted price.

There was no further reference to that until the summation on the counterclaims, when I believe Mr. Prettyman referred to those albums as proof that Capitol had a legitimate fear that the Adam VIII albums were not going to be selling at $4.98 as had been stated earlier but rather that they might be sold at $2.98.

Since that was during summation, we had no opportunity to point out that the albums were being used for a purpose totally different from what they had been introduced for.

We have subsequently gotten an affidavit by the president of Sutton Distributors, who is the company that operates Jimmy's Record World. They state that those albums had been in circulation for at least six months before they ever got to Jimmy's Record World and that Capitol's records were, similarly, sold at similar prices by Jimmy's Record World, and the point of this proof, your Honor, would be to show that the fact that albums eventually land in discount stores is not a basis for Capitol having reasonably believed that the new album about to be introduced by Adam VIII was going to be sold initially at a discounted price.

We wish to introduce that evidence to show the circumstances surrounding the sale at Jimmy's Record

World.

THE COURT: I don't really have much of a memory on that point.

It seems to me that it's really a piece of minutia but I won't try to comment on that.

I have another appointment in a few minutes, gentlemen.

Now, we will have to go back to that. What about this last point, about the Lennon albums?

MR. KANZER: Right.

We have, since the time of the trial, your Honor, or at least since the time of the counterclaims, learned that a number of albums of the Beatles are being released by TV mail order packages.

One of them, in fact, says that certain of the songs on it are being released for the first time. My recollection, your Honor, is that you counted very heavily in the first trial the question of whether Lennon would ever had agreed to allow his albums to come out initially by TV mail order.

THE COURT: What do you mean, I "counted very heavily"?

You have my decision.

MR. KANZER: Not in front of me.

THE COURT: Find the reference.

MR. KANZER: I believe it was during argument that you pointed to it. I don't recall whether it is in the actual decision itself.

(Continued on next page.)

MR. KANZER: I find no reference in the opinion to that.

THE COURT: Well, what is your point?

MR. KANZER: My point is, and I am sure I could find record references for your Honor, that during the course of the trial you did make statements to the effect, and I apologize if I do not completely accurately quote your Honor -- it is my best recollection -- to the effect that you found it difficult to believe that John Lennon would have entered into an agreement to release his initial recordings by direct mail order.

Certainly other witnesses testified that that was not the practice, and that it would not have been something that John Lennon would have considered.

We want to show that in fact similar albums by the Beatles are being released by TV mail order.

THE COURT: This is of absolutely no weight. It is contrary to what I am sure -- let me see the decision.

MR. KANZER: It does not make reference to it.

THE COURT: I believe it makes reference to the opposite.

MR. PRETTYMAN: Mr. Lennon testified that he was very interested in it. It is just the opposite, your Honor.

(Pause.)

THE COURT: I said, at the bottom of page 15 of the decision, and this is in that section headed by number IV, "Lennon was unquestionably interested in such a possibility," and the "such a possibility" refers to the possibility of having his new album marketed by Levy through television promotion.

I never thought otherwise and it was apparent to me he was interested and the thing was that, despite interest, there wasn't a contract, so I am not going to entertain this. I will deny your motion on the last ground here and now.

Now, we have got to figure out some expeditious format for presenting the particulars of the motion and letting the defendants respond and I see absolutely no reason for a lot of paperwork on this.

I think that what you ought to do, really, I think we should set another meeting; you come in here with your arguments and your exhibits and your record references and we just go through it and get it over with.

If we have a briefing schedule, we will be weeks.

MR. BERGER: May I be heard on the AFM point?

THE COURT: The only trouble is, I really have one of these long days of meetings and I don't want to go ahead with this now; I just can't. We have to have another

meeting on this. We are going to take up the AFM payments question and this EMI Canada sales or foreign sales, however you want to call it.

Now, those are two points on which I was prepared to have this motion.

Now, there are some other points which I think are just -- I am prepared to say here and now they are without merit as far as a motion but I think that Mr. Kanzer ought to be able to make his record and maybe I am wrong -- maybe I am acting too fast, but I think that the handwriting is on the wall as far as these other things and that relates to the Spector royalties matter, the cost figures in Exhibit 241-A, and the evidence about Adam VIII.

Those points I think you should all bring in the references for, as to those questions.

MR. PRETTYMAN: I think we might do it more expeditiously if he submitted something briefly in written form and we addressed ourselves in written form specifically in references to the record.

THE COURT: As long as that can be done fast.

MR. PRETTYMAN: Right, because if he comes in with something and we are supposed to be arguing back, we will be shuffling through the record and we won't be that helpful to the Court.

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THE COURT: When are you going to have --

MR. KANZER: I am going to be away the first three days of next week.

THE COURT: What about Mr. Schurtman or Mr. Diamond.

MR. KANZER: I am not sure of Mr. Schurtman's schedule. He is not in today.

I could suggest August 2 I would be prepared to come in. Alternatively, I could have written information hand-delivered to the New York attorneys on Friday, July 30, and they would then have an opportunity over the weekend to review it and we could discuss it on Monday, August 2.

THE COURT: Well, if Mr. Kanzer has his papers in the 30th -- I want to dispose of this before or not later than the night of August 5th; that's that.

Now, what this means is I want to get the motion decided and I want to get a judgment signed. There will be a judgment, even though there may be some amendments to the findings. That all has to get wrapped up.

I could have a hearing on the 4th.

MR. KANZER: That would be fine with me, your Honor.

MR. PRETTYMAN: I would prefer to have it on the 2d or the 3d than the 4th.

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THE COURT: Well, what's wrong with the 2d? Why don't we say 2:30 on the 3d, because of some problems I have been advised of on the 2d.

MR. KANZER: Your Honor, if it is going to be on the 3d, could we have some responding papers from the defendants prior to that time?

THE COURT: What about that?

MR. PRETTYMAN: The day before? All right.

THE COURT: Why don't you try to serve and file by noon the day before.

MR. BERGEN: That means we will have to work on the weekend.

MR. PRETTYMAN: Your Honor, when Mr. Kanzer says the 30th, that would mean service on me on the 30th, too?

MR. KANZER: Well, I said on the New York attorneys. We really don't see --

THE COURT: You know, you are asking for an extravagant amount of time. Just an awful lot of time.

These are points that I would think you would have your papers for already. I mean, to walk into court and then say "I have got to have another week," and you are going to be gone for three days, if these fellows get your papers on the 30th and then they are supposed to respond by the 2d --

MR. KANZER: They can respond the morning of the 3d; it's fine by me if I receive the papers by ten o'clock on the morning of the 3d.

THE COURT: As far as I am concerned, you can bring them to court. I probably won't have time to go over this stuff, and the only reason for the papers is so that the parties are prepared to argue.

Now, if you have your papers filed and served by the 30th and you get them to Washington on the 30th -- you can fly them down -- then the other side may bring their papers to court.

MR. KANZER: Do we get an opportunity to see their papers in advance of the 3d?

MR. PRETTYMAN: We'll give them to him a couple of hours before, so he will have time to read them.

THE COURT: I don't think the thing is all that difficult. I think you can deal with it on the spot and that is the way I am going to do it.

MR. BERGEN: I want to register an objection, your Honor, if I may. This is not the Court's fault but the whole procedure -- they have had three months to raise these points. I left my family in the Virgin Islands and flew here to come to Court and I am supposed to go back this afternoon.

I think it is outrageous to let this dangle for three months and then to come in at this late date and try to put in more evidence.

THE COURT: Well, look, Mr. Bergen: I don't think we are going to have more evidence and I think that what we have to do is, as far as I am concerned, there is practically no chance of this motion getting beyond the two points we have talked about and I think you are probably reasonably well-prepared on those two points.

A lot of new points that I heard of this morning are points that are not really new. I don't think we have to talk about it further.

I don't see any other way to get the thing over with before the 6th of August and get done what we can by that time.

MR. GRUMBACH: Your Honor, I have seen nothing on even the entire list that Mr. Kanzer has presented this morning that affects my client, Apple Records.

THE COURT: Then you don't have to do anything.

MR. GRUMBACH: And I would ask if I might be excused from the future --

THE COURT: It's up to you.

All right, gentlemen.

(Matter adjourned.)

CLOSED

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(189)

AUG 7 1976
S. D. OF N.Y.

(EWL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BIG SEVEN MUSIC CORP., et al.,	Before: HON. THOMAS P. GRIESA, District Judge
vs.	
JOHN LENNON, et al.,	75 CIVIL 1116 (TPG)
Defendants.	

----------x

New York, August 3,5, 1976

STENOGRAPHER'S MINUTES

(189)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

BIG SEVEN MUSIC CORPORATION, et al., :

Plaintiffs, :

-against- : 75 Civ 1116

JOHN LENNON, et al., :

Defendants. :

----------x

New York, New York
August 3, 1976 - 2:45 p.m.

BEFORE: HON. THOMAS P. GRIESA,

District Judge

APPEARANCES:

WALTER CONSTON SCHURTMAN & GUMPEL, P.C.
Attorneys for Plaintiffs
330 Madison Avenue
New York , New York
BY: ALAN KANZER, ESQ.,
MICHAEL HIRSCHBERG, ESQ., Of Counsel

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, ESQS.,
Attorneys for defendants John Lennon and Harold Seider
BY: HOWARD P. ROY, ESQ., Of Counsel

CLEARY, GOTTLIEB, STEEN & HAMILSON, ESQS.
Attorneys for defendant Apple Records, Inc.
BY: GEORGE J. GRUMBACH, JR., ESQ., Of Counsel

HOGAN & HARTSON, ESQS.,
Attorneys for Capitol Records and EMI
BY: ROBERT J. KENNEY, JR., ESQ., Of Counsel

THE COURT: Who is here for Mr. Prettyman?

MR. KENNEY: I am, your Honor. My name is Robert J. Kenney. I appeared before you once before.

THE COURT: Let us take the items in order.

This is a motion to amend the findings of the Court entered April 8, 1976, on the subject of the defendants counterclaims and the first item is a claim that the recovery of Capitol for lost profits and the recovery of Lennon for lost royalties should be reduced by an amount which each would have had to pay to the American Federation of Musicians, is that right?

MR. KANZER: Yes, it is.

THE COURT: You contend both Capitol and Lennon would have had to make such payments, is that right?

MR. KANZER: Not exactly, your Honor. I think I take the position that the record is ambiguous as to who of the many defendants is actually responsible for making the payments.

Mr. Posner, you may recall, testified it was Apple that in fact would make the payments. We only know the contracts provide that both the record companies are supposed to make the record payments.

Earlier in the trial you asked what Apple's general position was and I think the position that was taken was that the defendants would work out among themselves who

was actually responsible for making what payments and who in fact would receive what the awards were.

It is our position that whichever of the defendants would actually make the payments, Apple in effect acted as a conduit between payments from Capitol to Lennon and so if it comes out of Capitol it would ultimately come out of Lennon or vice-versa.

Apple might technically be the party that made payments, but it would be pushed in one direction or another to other defendants.

THE COURT: Is there something where there is evidence now in the record on this subject or is it something which you need to introduce further evidence on?

MR. KANZER: I don't think that we would be able to introduce any evidence on the question of which actually makes the payment. Mr. Posner did testify that it was Apple who made the payments or would be responsible for making the payments. As to the evidence --

THE COURT: Is there any evidence contrary to that in the record?

MR. KANZER: None to my knowledge.

THE COURT: How can you stick Capitol or Lennon with that?

MR. KANZER: Because what Apple paid, Mr. Seider

said ultimately comes out of the share that is going to Mr. Lennon, because he receives net royalties according to Mr. Seider.

MR. KENNEY: Your Honor, May I interrupt for just a moment?

It is not clear to us whether we are at the stage now of deciding whether this question will be opened or reopened or whether we are at the stage of representing or discussing what the nature of the evidence would be.

Has your Honor made a ruling as to whether this subject--

THE COURT: I am going to rule on specifics.

In my decision of April 8th I said that the evidence is that Lennon was entitled to a royalty of 68 cents per unit for the disks and 64 -- I'm not saying this right.

The evidence is that Lennon was entitled to a royalty of 68 cents per unit for the disks and 64 cents per unit for the tapes.

Now, that is a flat amount of cents and no objection has been taken to that factual finding.

Is there anything wrong with that finding?

MR. KANZER: What I believe the finding is is that that is a percentage of the manufacturer's retail suggested list price, which is what by contract he is to get.

However, as the defendants introduced --

THE COURT: That is not my finding. My finding is 68 cents for disks, 64 cents for tapes per unit.

MR. KANZER: I was under the impression that what your Honor was doing there was simply taking the percentage royalty applied to the stated price on both a record and a tape.

THE COURT: You have got the record. I told you, I haven't gone back over this record and if you will sit here, take plenty of time, the record is over there, you find what the evidence is on that. It is up to you to produce the evidence. If John Lennon would have his royalty reduced because of AFM payments made by Apple, well, then, let us have the record citation.

MR. KANZER: I would like to refer your Honor to your own statement on page 3066 of the transcript.

"It is not that we really got three different people, three different companies directly claiming against the plaintiff. It is really a claim of lost sales and profits, and it is up to them to pay each other, depending on their contractual arrangements.

"Isn't that basically right?

"MR. BERGEN: Yes, except Apple's claim is Mr. Lennon's claim, and I will have just a half dozen questions

to ask Mr. Posner to bring out what Mr. Lennon's loss in terms of royalties would be..."

I take that, your Honor, to mean very clearly that it was agreed earlier in the trial that it would be up to the defendants to work out among themselves which defendant was entitled to which share of whatever award would be given.

THE COURT: By the time of my decision we were well past any kind of broad brush treatment. I was dealing with specific parties making specific claims. We had spent a great deal of time at the trial on the subject of what net profits Capitol claimed to have lost and once you get into that, you are not in a kind of an amalgam of lumping people together.

There was specific proof as to what Capitol claimed to have lost in the way of net profits and that excluded any and all expenses that anybody wanted to propose as being something Capitol would have to incur.

Then we dealt with the question quite separately of Lennon.

Now, during the course of this proceeding Apple announced it was not making a counterclaim. So I dropped Apple from consideration as far as its claim.

Isn't that right, Mr. Grumbach?

MR. GRUMBACH: Yes, your Honor.

THE COURT: Okay. So you don't help me by taking a broad brush treatment. If you want to tell me, if you want to trace the evidence in some precise way about why you cany say that Lennon or Capitol-- Capitol would have incurred this as an expense and thus had their profits reduced, okay. If you show this as far as Apple alone, it doesn't help you because Apple didn't get a dime in damages.

MR. KANZER: May I suggest the first thing we do, as I think Mr. Kenney was suggesting, first deal with the question whether there were any AFM payments to make and if so, what the amounts were and then address ourselves to who would have to make them. Then we will have the record clear as to whether payments were due and what their amounts were.

THE COURT: That's a good thought. Let us see if the record shows that AFM payments were due from somebody.

Where is that shown?

MR. KANZER: In my affidavit I point out that we have the contracts attached, Mr. Zucker's affidavit, as to what the contract provides with the AFM --

THE COURT: You are now referring to evidence which was not in the trial, right?

MR. KANZER: Well, I believe that you may recall, your Honor,that during the course of the trial Mr. Schurtman

did ask Mr. Posner about AFM payments, the subject was brought out, in fact, on page 3114, the question is:

"Let's move on to the AFM line which you said shows nothing."

He is referring there to Plaintiff's Exhibit 241A--

THE COURT: Can I have 241A?

MR. KANZER: It is attached to the motion papers. I think it is an attachment to Mr. Masler's affidavit. So it would be right before Exhibit E. It would be Exhibit B to Exhibit D to my affidavit.

THE COURT: I have it.

MR. KANZER: You will see, if you look down under AFM, there is a handwritten word, "Apple," and then it says "A" and then it has the zero across. There was no deduction made for Apple for AFM.

THE COURT: I have got Mr. Posner's testimony, page 3114, what you mention in your affidavit.

MR. KANZER: And he said that Apple paid them.

THE COURT: All right.

MR. KANZER: Also --

THE COURT: Just a second.

(Pause.)

THE COURT: Okay.

MR. KANZER: Also, may I refer the Court to page 3814 of the transcript where Mr. Schurtman said:

"Someone has to pay the AF&M fees. We are talking about approximately $19,000."

And then Mr. Bergen says:

"They have already been paid and the documents were produced by Capitol and evidenced they were paid."

There, if I may suggest, Mr. Bergen was referring to different types of AFM payments from those that we are dealing with here. There he was referring to payments in connection with recording costs and those we do not question were paid.

We are talking about those that are in connection with the number of albums sold, and that is the contract that has been attached as an exhibit to Mr. Zucker's affidavit.

Also, you will note --

THE COURT: Just a minute.

MR. KANZER: I just wanted to bring to your attention on 3815, Mr. Schurtman did observe that the deduction we are talking about would come out of Mr. Lennon's 66 cents that you referred to earlier.

THE COURT: Let's get the chronology.

MR. ROY: Your Honor, if I may, I think it is the point to which you were about to address yourself.

I think it is important to bear in mind the dates upon which these various discussions took place. The

pages to which Mr. Kanzer has alluded to now were on the 15th of April, which is some one week following your Honor's decision, or else it is the 21st of April.

THE COURT: Look, I dictated the decision on the counterclaims April 8, 1976. Now, we then had some proceedings about a claim that the Canadian sales figures were inccrrect, isn't that right?

MR. KANZER: I know we had such a proceeding. I am not at this point sure of the chronology of that, your Honor. I think you are correct, sir, it was approximately at that time.

THE COURT: Just a moment.

The record shows what it shows. We had some post trial proceedings dealing with various claims of Mr. Schurtman at that time and this was April 21, 1976, and in the course of that discussion at page 3814, there was a discussion of AFM fees.

What do you say that pertains to --

MR. KANZER: We say that the fees that we are requesting are fees that are paid to two plans under the AFM which are in connection with a number of albums and tapes of a record that are ultimately sold by the record company. Mr. Bergen, again, when he was referring to payments having been made, was confusing thattype of AFM payment with a

payment to the Musician's Fund in connection with recording an album, which is a totally different type of payment.

In other words, there are whole theories and types of payments that the record companies pay to the AFM. One is the type alluded to by Mr. Bergen which is in a document Capitol produced earlier, which shows it as a cost of recording session payments that must be made to the AFM. The types of payments we claim were omitted is a payment in connection with the number of albums sold, and those payments are under the phonograph record trust agreement and the phonograph record labor agreement, special payments fund.

We have attached to our moving papers as exhibits the relevant portions, addendum A, in each case, which details exactly how one computes what payments are due, and I might add, your Honor, that none of the defendants have contested either the fact that such payments were due, that such payments were not made or and such payments in the amounts specified in the moving papers.

MR. KENNEY: The defendants are far from the point of reaching a dispute on the calculations which Mr. Kanzer has set forth in his affdiavit.

The agreement to which Mr. Kanzer just referred of course is not evidence and I think the fact your Honor was following up to this last moment of referring to the record for what is in the record as to these obligations

to pay, if any, is the tact that should be taken.

We have not yet established there is some right to open this issue or reopen this issue and go into a hearing.

MR. KANZER: Your Honor, I was under the impression that you wnated us today, both sides, to finally discuss all references to these things. We did in our moving papers give details and if the other side doesn't want to contest it that is their decision.

THE COURT: I want to consult the record. Give me a minute, please.

(Pause.)

THE COURT: Let's get the record out, page 3814. That was that hearing of April 21st where certain matters were gone into about the counterclaims. I want to take that up very carefully.

MR. KANZER: May I suggest that your Honor start with the preceding page?

THE COURT: 3813?

MR. KANZER: Yes. The bottom of the page.

THE COURT: I don't want to summarize what is in the record, but if you go to 3814, Mr. Schurtman is saying:

"Someone has to pay the AF&M fees. We are talking about approximately $19,000."

Then Mr. Bergen said:

"They have already been paid and the documents were provided by Capitol and evidenced they were paid."

Did you comment on that earlier?

MR. KANZER: Yes, I did.

THE COURT: What your comment on that?

MR. KANZER: That Mr. Bergen's comment is inaccurate. Mr. Bergen is referring to a different type of AFM payment. What Mr. Bergen is referring to is the payments that are made in connection with recording agreement. Under the AFM contract, standard AFM contract, your Honor, when musicians are hired to do a recording a certain payment must be made into the AFM fund for musicians. That payment was apparently made.

The documents Capitol produced of its recording costs do indicate that such payments were made. That is what Mr. Bergen is mistakenly referring to at that time. What Mr. Bergen was apparently unaware of is that there is another type of AFM payment, that which we are now claiming should have been deducted and which Capitol did not in fact deduct.

THE COURT: At the top of 3816 Mr. Schurtman says that:

"On each album that is sold an AFM fee would have to be paid. I'm told it is .056."

MR. KANZER: That is a close approximation.

THE COURT: That's an average of tape and record."

Then I asked on that same page:

"What is the evidence to support that?"

Mr. Schurtman says:

"It's industry practice and the American Federation of Musicians' agreement."

Then I asked:

"Is that in evidence?"

Mr. Schurtman said:

"Not at this point."

Then he argues that the defendants had the burden of proving their costs and they left this figure out and when he cross examined Mr. Posner, Mr. Posner said that Capitol doesn't pay it, Apple pays it.

Then Mr. Schurtman argues that that shouldn't be so and on 3817 Mr. Schurtman says he would be gald to put a witness on except he thinks that it isn't his bruden but he would put a witness on Monday.

Then I said the trouble is that everybody has rested.

Then Mr. Schurtman said that he had cross examined Mr. Posner about it and Mr. Posner had said the

AFM fees are paid by Apple.

Then he says that he started to go into the Beatles' settlement problem and that I cut him off. And then at the top of 3818 Mr. Schurtman said at the moment there is no evidence in the record as to the AFM fees having been paid.

Then finally at 3818, line 10, I say that if Mr. Schurtman wants to put evidence in on Monday about the deduction, he can do it.

Mr. Schurtman said he would do it.

Now, there are two questions procedurally that I want to cover. I want to look at the record and see if I indeed cut Mr. Schurtman off from putting in further proof about the payment of the AFM fee and then I want to know what happened on Monday when Mr. Schurtman was invited to put some evidence in.

For the first question, we go back to 3114 of the record. There, as has already been pointed out, Mr. Posner, a witness for Capitol, was asked if Capitol paid AFM fees.

Posner answered, "Not on Beatle products."

Mr. Schurtman asked:

"Who pays them?"

Mr. Posner answered:

"Apple Records."

Then Mr. Schurtman started to say something. Mr. Schurtman started to say:

"For the purpose of this case, that Mr. Lennon--"

and then I broke in and said:

"Apple Records pays it. That is what his knowledge is. Now let's go on."

Then Mr. Schurtman started talking about AFTRA. So that's what that record shows.

Now, what happened on Monday, after the 21st of April? Did Mr. Schurtman offer to bring in evidence or didn't he?

MR. ROY: Your Honor, if I may be of some help.

THE COURT: Yes.

MR. ROY: If you go through the transcript of April 26th you will find the entire day went by without any mention of AFM.

THE COURT: That was Monday?

MR. ROY: That was the day following --

THE COURT: What did we do on that day?

MR. ROY: Beginning of the day on Monday?

THE COURT: Did you have the transcript of the 23rd?

MR. ROY: 26th, which is the Monday following the 21st.

Page 3828 of the transcript, your Honor, and it begins with Mr. Schurtman stating as follows:

"If your Honor please, we have been spending the last few days trying to figure out these Canadian figures. I have subpoenaed Mr. Allen Klein, who you have previously hear as a witness, who has certain Canadian statements which--"

And then at that point your Honor stated:

"What is he doing with Canadian statements?"

And the transcript continues to deal with Canada and a number of other witnesses and there is no mention made of AFM.

THE COURT: Did you go through this, Mr. Kanzer, and did Mr. Schurtman offer to bring in evidence about AFM at that time?

MR. KANZER: Are you referring to Monday, your Honor?

THE COURT: Right.

MR. KANZER: I don't believe so.

THE COURT: Can you explain why?

MR. KANZER: Trying to remember, I can only recall that we got so wrapped up on the Canadian question that somehow it did not get picked up. I do know that we did have Mr. Zucker present and Mr. Zucker was in a position to discuss

the AFM question and somehow it did not happen.

THE COURT: Didn't we swing --

MR. ROY: Excuse me, your Honor. In fairness, virtually the last page of that day's transcript, page 4044, after the entire day had gone by and after your Honor had advised counsel earlier that your Honor would have to proceed with a criminal matter, there is once again Mr. Schurtman bringing up AFM. But they had an entire day to bring it up and it wasn't.

THE COURT: That was the very last day of any trial, wasn't it? All the evidence was in on all phases? That was the 23rd day of trial, according to my record. Didn't everybody rest? Didn't we take testimony on the very last phase of the case?

MR. KANZER: As your Honor earlier pointed out you did say you would reopen for the AFM.

THE COURT: I have to get oriented as to what we were doing on the 26th of April, and I believe that that --

MR. KANZER: That was concerned with the Capitol Canadian matter primarily.

THE COURT: But we had evidence from Mr. Levy, we had evidence from Mr. Strauss, Mr. Robinson.

These are matters dealing with the amendment of Big Seven which I dealt with in the third

decision and that was the last day of evidence on that, wasn't it?

MR. ROY: I believe so.

THE COURT:: I am not sure whether that was the last day.

MR. KANZER: If I may reconstruct, your Honor apparently did decide that on that Monday we would have been permitted to go into the AFM and Mr. Schurtman does apparently say on the bottom of 4044 that he has not yet had that opportunity and Mr. Zucker is present and able to do so.

I had heard Mr. Zucker was there. I had not ruled that Mr. Schurtman had in fact offered to do that.

THE COURT: I think that this was still open. It certainly is my memory that I intended to have it open.

MR. ROY: Your Honor, if I may be heard.

THE COURT: Yes.

MR. ROY: I think one cannot dispute that on the 21st of April your Honor indicated that you would permit them to put on their evidence and Mr. Schurtman stated that he would do so. But I think if you consider the dates that are involved, going all the way back -- the key date is April 8th, the date of your Honor's opinion, which is the opinion that is concerned with the matters that are being

raised now, you considered the day before -- April 7th is the date that the plaintiffs and Levy rested their case.

It is not until April 15th that the first mention of AFM is made by Mr. Schurtman. The evidence, an example of which is Exhibit 241A, and cross examination of Mr. Posner, shows that AFM was certainly a matter known to Mr. Levy and the plaintiffs. Moreover, Mr. Levy, I don't think anyone disputes, has been in the record business for many years. Indeed, Mr. Zucker, the accountant for Mr. Levy, had been in court any number of days.

On April 15th for the first time Mr. Schurtman indicates something about an AFM deduction. I would, before going on, point out when Mr. Posner was testifying and I think if you read that section of his testimony, it is clear that he was not testifying to make a definitive statement as to who, if anyone, had an obligation to make an AFM payment. Mr. Posner was, in terms of the cross examination which appears on page 3114, explaining why on the exhibit which is 241A he showed "zero" and the AFM line.

The obligation I would submit was upon Levy and the plaintiff to have pursued that matter further. They did not. On the 15th mention is made. On the 21st, well after your Honor's opinion of the 8th, they raise it again. They are given the opportunity to put on their case. They

go through a full day of trial and then at the last moment, kind of as an afterthought, they ask you at a time when it must have been apparent you could no longer hear further testimony, they ask to put the case on and there is nothing further.

THE COURT: I don't want to go back on my word.

MR. ROY: I don't think you are.

THE COURT: At this juncture I don't know why I indicated on the 21st of April that I would receive further evidence on that point, but I said, and it is stated at 3818, "If you want to put on evidence about the deduction, you can put it on."

Now exactly why I was moved to say that, I don't know and I am not going to read over every line of this record to find out. If my memory is at all accurate, I felt it was a rather clearcut thing and perhaps I had cut Mr. Schurtman off or misled him in some way to think that I was cutting him off and for some reason I was moved to say he could put on a witness.

Now, it doesn't really make any difference to me whether the witness was put on on Monday, the 26th or later. It still involves an amendment of my findings and I can amend those now as easily as I could the 26th of April. As far as the 26th of April is concerned, the matter was left

hanging at the end and I cannot say that Mr. Schurtman should have proferred Mr. Zucker at that time. We came to the point where I had to close the hearing because I had another matter. I ended up saying:

"I will see what we need to do on those other points."

MR. ROY: My point, your Honor, is that it was not an accident and it was not the fault of the Court that this matter, when the proceeding began at 9 a.m. on the 26th and Mr. Schurtman on the 21st had represented he was going to put on his witness and Mr. Schurtman commenced on the morning of the 26th, that it is no accident that it wasn't until after an entire day was spent and it was obvious your Honor could not take the evidence, that all of a sudden it is once again mentioned by Mr. Schurtman on literally the last page of the transcript.

THE COURT: What do you mean it was no accident?

MR. KANZER: I would like clarification of that, too.

THE COURT: What was being concealed? I don't know what you mean by it wasn't an accident.

MR. ROY: I say this is a matter which was consciously decided by Mr. Schurtman not to be pursued at the time when he had the opportunity to do so.

THE COURT: It doesn't make any difference.

MR. KANZER: Mr. Scurtman would have had absolutely no incentive not to put the evidence in because we are obviously trying to get it in now and since neither Capitol, EMI, Stoddard, nor Apple have apparently rechallenged the accuracy of the statements.

MR. ROY: That is not a fair representation. We have a responsibility on behalf of John Lennon. I submitted an affidaivt -- the Hogan & Hartson firm have submitted a memorandum of law on the threshhold question, whether additional evidence should be taken on this point.

THE COURT: As far as the accuracy of the calculations, is there any challenge as to that?

MR. KENNEY: Your Honor, we at this point would object to even reaching that point.

THE COURT: You should have reached it in your affidavit. I wanted very much before I came into this hearing today, I wanted to know about the accuracy or in accuracy of the detailed factual allegations. Indeed, if I recall, this matter of the AFM cost was one of the things, one of the very few things, which I said at our last hearing I would seriously consider entertaining and doing something about. Isn't that right?

MR. KANZER: It certainly is.

THE COURT: I am certain I did. So really I think this was something you should have responded to and I assume you are informed on it. Are their figures right or wrong? I don't want to hold this matter up for another point.

MR. KENNEY: The problem is that at the time that you made -- even as late as the July 23rd decision to reconsider this issue, I don't believe that you had before you, and I think, to tell you frankly, I don't think even we as counsel for the defendants in this case fully realized what was going on here, that this is a much more complicated issue than appears from the face of Mr. Kanzer's affidavit.

Not only do we have the issue of who is responsible, if anybody is responsible, for the payment of these fees, and this is quite apart from the calculation of the amounts which pales into a problem of insignificance compared to the others, but we have the problem of whether anybody is liable.

Now, there is simply nothing in the record, and Mr. Kanzer may refer to a contract or he may refer to an addendum which he has put in his affidavit, even if that were in evidence it is our information, and we have had only the weekend to hurriedly try to determine the state of affairs, but that there is a serious question as to whether anybody

is liable to pay these fees.

This is the sort of thing that you are certain to get into if we reopen this issue. I think at the time you made your decision on the point first you had the idea that this was a matter of arithmetic and it could be worked out. If it were, I have no doubt we could work out this issue.

THE COURT: The thing is when we were together on the 26th I ended up saying we would see what we had to do. I have all along considered that there is one thing that would come up on the motion to amend findings, and that is about the AFM fees. So I think that if that is my mind I really am constrained to say that I am sure I would be misleading the plaintiffs if I all of a sudden cut them off. And I am not going to do it.

It is possibly 9 or 10 thousand dollars, and 9 or 10 thousand dollars is a substantial amount of money and I don't like to hold up the judgment but I am perfectly prepared today to go into that issue if counsel were prepared to go into it.

I will say to all of you that is the only thing I am prepared to go into. I think these other things do not involve any commitment by me to keep the record open or any commitment to receiver other evidence and these other things I think go by the boards. But this does not.

MR. KANZER: Your Honor, I assume you are going to hear argument on the other?

THE COURT: I will hear it briefly. I have read the affidavits and I know where I stand.

So, I think we just are not prepared to resolve it. That is unfortunate.

MR. ROY: I am not sure I understand.

THE COURT: I am willing to do what I said I would do, that is, to hear evidence on the issue of AFM fees. I will keep my promise on that and that's that. If you are not prepared to go into it today, we will set another date.

MR. ROY: That I understood, your Honor. What I did not understand is whether your Honor was ruling with respect to the other points raised by Mr. Kanzer.

THE COURT: I will go into them piecemeal. Is there anything wrong with his calculations?

MR. ROY: It is based on assumptions -- I take that back. I cannot at this point tell you they are correct.

For instance, the initial assumption that in fact AFM is owed. Next problem, and there are two problems here, is the question as between the administrators of the defendants, which of them bears the ultimate responsibility for the AFM expenses.

THE COURT: What was the basis for Mr. Posner saying that Apple did?

MR. KENNEY: That Apple did?

THE COURT: That Apple was responsible for paying.

MR. KENNEY: I am afraid none of here can really speak for what was in his mind. I can say that Mr. Posner's qualifications were as to what Capitol did and would pay and he testified as to that.

THE COURT: Can you get me something on this Thursday? Could you be back and prepared? That is my last day. I will give you some time and will hear this out on Thursday and I will either amend the findings on this point or I won't.

MR. KENNEY: I may have failed to stress what may be involved in litigating this kind of an issue, your Honor. This question of whether AFM fees are payble really goes to the whole relationship between and among Capitol, EMI, Lennon, the other Beatles, going back for many numbers of years.

THE COURT: Look, somebody in the Capitol organization and somebody in Apple and somebody in Lennon must know who paid AFM the particular fee we are talking about or maybe nobody paid it, but they must know about it and it

seems to me it must be possible to find out between now and Thursday what your position is. This is not a matter of litigation. This is a matter of business.

MR. ROY: Your Honor, if I may, if we could proceed with the other points raised by Mr. Kanzer and if in fact this is the only open point left and it is going to entail many days of trial, there may be other things to consider in our decision if you could defer to the end of the situation.

THE COURT: All right, let's go forward.

The next item is the claim that the findings should be amended and new evidence received to reflect a cost consisting of royalties due from Capitol and Lennon to Phil Spector.

Now, this is not something where I made any commitment to keep the record open and it is a point where additional evidence would be required to be admitted into the record to allow a calculation of this kind.

MR. KANZER: I disagree with that.

THE COURT: What is the evidence in the record which would permit the calculation?

MR. KANZER: All right, your Honor.

My feeling about this is as follows --

THE COURT: It is not your feeling. What is the evidence in the record?

MR. KANZER: The evidence in the record is that there was a 3 percent royalty that was payable to Phil Spector, a 3 percent prorated royalty payable to Phil Spector, to be borne 50 percent by John Lennon and 50 percent by EMI.

Now--

THE COURT: Where is that? You show me the page.

MR. KANZER: On page 1209. This is the testimony of Harold Seider.

Mr. Seider said:

"'I believe John's royalty is about 12 percent,' and I said, 'We have the Spector problem,' because Spector--and I mentioned to Levy that Spector was getting 3 percent as a producer royalty which would be shared between EMI and Lennon --"

THE COURT: Just a moment.

MR. KANZER: That was at page 1209 to page 1211, your Honor.

Then again I refer the Court to 1211, where I questioned Mr. Seider:

"Q So you explained to Mr. Levy what the Spector royalty was?

"A That's correct.

"And I said it is borne 50 percent by EMI and 50 percent by John.

"Q Are you talking about the Spector"--

THE COURT: Where are you reading?

MR. KANZER: 1211.

"Q Are you talking about the Spector --

"A This is the Spector-EMI royalty agreement.

"Q Was that Spector royalty discussed at all on October 8th?

"A No."

THE COURT: What is the evidence that this in fact ended up being something which had to be paid by Capitol and Lennon if they put out the albums?

MR. KANZER: On page 1212, your Honor:

"THE COURT: Let me just get this clear.

"By the time of your meeting at the Club in late November, you had in hand the Spector-EMI royalty agreement, is that correct? Had that been finished?

"THE WITNESS: The drafts had been going back and forth. I had seen some of the drafts because they are submitted tome for review and it was out for signature. I believe it was signed around that time or that John had signed the papers at that time.

"THE COURT: But the terms had been agreed upon?

"THE WITNESS: The terms had been agreed."

Now, again on page 1213, your Honor, the Court:

"THE COURT: I am not clear what the significance of the Spector royalty would be?

"Is this something that EMI and Lennon would have to pay out of what they made?

"THE WITNESS: That's correct. That's correct.

"The agreement provided that each would share 50 percent of that 3 percent royalty."

Now, there is additional testimony by Phil Cahl and Morris Levy that confirms Seider did in fact say that to them. So, your Honor, our position was there was this record proof that there was a 3 percent royalty payable to Phil Spector by EMI and Lennon.

THE COURT: Where is there any evidence that, for instance, backs up what you say in paragraph 26 of your affidavit on this motion which says that:

"An examination of the May, 1974 agreement between Spector and EMI and a consent thereto signed by Lennon readily shows that Spector was to receive a prorated 3 percent royalty based on 90 percent of the bare record price of 100 percent of the number of units or Rock & Roll sold in the United States and the number of Spector recordings sold on the album"?

MR. KANZER: Could I ask for clarification of your question? When you say where is the support for that

statement, that statement is supported by Exhibit B. If you are asking where in the record there was anything about that the answer --

THE COURT: Exhibit B is not in evidence now.

MR. KANZER: That's correct. If you are asking where in the trial record there would be such a thing, there would not.

Consequently, your Honor, if your Honor does not wish to admit Exhibit B at this time, then I respectfully submit that the Court should be calculating the deduction on the basis of what is in the record, namely, Seider, Cahl's and Levy's testimony that there was a 3 percent royalty payable to Phil Spector. I might also point out, your Honor, that would be a higher amount than we are claiming.

THE COURT: But, at the time of the discussion, at the time of the counterclaim evidence --

MR. KANZER: This is all in there, your Honor, at the time of the counterclaim.

THE COURT: Just let me finish.

At the time of the presentation of evidence on the counterclaims and particularly at the time of the arguments as to the costs to be taken into account, did you or Mr. Schurtman request that Phil Spector royalties be included in the costs?

MR. KANZER: I don't recall whether that specific request was made. I do know that your Honor, when you awarded costs --

THE COURT: Don't go to some other subject. Was a request made for me to take into account Phil Spector royalties in connection with the Capitol and Len costs or the EMI costs?

MR. KANZER: The only request that was made was that your Honor deduct all costs that were costs of the defendants. Your Honor subsequently said, and I would go back to page 3813, the Court stated, and this I think you established was the week after or two weeks after, I think this may have been on the 15th. I don't have the dates of this. It was April:

"THE COURT: Yes, when I dictated that bench decision I was relying on the statement by Apple that they were seeking no independent compensatory damage award. I was relying on the presentation of Capitol that their damage claim was a net figure after deduction of all variable costs including payment of royalties or fees or anything like that; right, Mr. Prettyman?

"MR. PRETTYMAN: Yes, sir."

THE COURT: That was said in the context of the problem we were dealing with.

Look, I am denying the motion to amend my findings to include or to take into account anything about Phil Spector royalties and I am denying the proffer of additional evidence on that point. It seems to me clear that the question of the costs to be taken into account was an issue which was litigated thoroughly at the time of the taking of evidence that led up to the April 8th decision which I dictated and certainly anything in the record up to that time could have been brought to my attention as bearing upon that decision and there was no suggestion that this Phil Spector royalty item should have been taken into account and there was no statement to me as to the method of calculation, there was no indication that there was enough in the record to permit such a calculation, and, indeed, the evidence which would have permitted an alleged precise calculation on the Phil Spector royalty as alleged by the plaintiffs now was not in the record at that time.

So the motion is denied as to the Phil Spector royalty.

Let's go to the next point.

MR. KANZER: Could I comment at all about that?

THE COURT: No.

MR. KANZER: What would you like to consider next?

THE COURT: Jimmy's Music World. This is

entirely without merit. I will not receive the affidavit of Charles J. Sutton which is offered to be admitted into evidence. The matter is of very little consequence as far as my decision was concerned and, moreover, it is belated evidence and I will simply not admit it, nor do I see the slightest reason to amend my findings.

My findings stand for what they stand for, but I will simply state that after all kinds of arguments, lengthy argument about the issue of the reduction of Capitol on its albums from $6.98 to $5.98, I held in favor of Capitol on that point.

In other words, I held that there had been a reduction which was caused by the activity of Levy and I held that it was relevant insofar as damages were concerned and I had all kinds of evidence presented about the fact that the reduction in this price, which was the suggested retail price, was irrelevant because the Capitol records would normally be sold at substantial discounts and I held and would have no reason to change my view even if I accepted this proffered evidence, I held that -- I rejected the argument that the suggested retail price was meaningless and irrelevant.

In the first place, not only was it suggested retail price reduced, but the wholesale price was reduced,

which I referred to at page 3472 of the record. The wholesale price was reduced from $3.54 to $3.06 per unit, and that wasn't some suggested retail price or some discounted retail price, that was the price that Capitol charged to its customers.

Damages were based on that reduction of Capitol's price from $3.54 to $3.06. I would have no reason to change the finding that I made in that regard on the basis of anything offered now.

So the motion in respect to Jimmy's Music World is denied.

The next point relates to sales by the Canadian Record Corporation, and on this I have somw questions for Mr. Kenney.

The claim is that I included 65,000 Canadian units in my award of damages for the price reduction and that discussion is at page 3472 of the record, the decision I dictated on April 8th.

Now, is there anything in the record, Mr. Kenney, which justifies a finding that there was a net profit reduction of 24 cents per unit as to the 65,000 Canadian units?

MR. KENNEY: Your Honor, are you questioning the evidence as to the amount of the reduction? Because Mr. Posner testified that this calculation as to the 24 cent

difference which resulted from different price levels was applicable not only to domestic, but to Canadian sales.

THE COURT: But there was a different reduction. The one thing Mr. Posner did not testify to was the reduction of net profit and that's what I calculated the damages on.

Have you got my decision?

MR. KENNEY: Yes.

THE COURT: Look at page 3472. The 24 cents is the crucial figure in arriving at the $105,000 damage figure which I gave on that particular item, right?

MR. KENNEY: Yes.

THE COURT: Okay. We all know how the 24 cent figure -- what that is, but let's review it. The price which Capitol charged in the United States or would have charged on a $6.98 album and a $7.98 tape was an average of $3.54 per unit. I think I am reciting this correctly.

Anyway, the crucial figure is $3.54 per unit charged by Capitol to its customers.

Now, in view of the price reduction that became $3.06 per unit. So there was a reduction in gross of 48 cents, the difference bewteen $3.54 and $3.06.

Now, the figures which Capitol came up with brought that gross of 48 cents down to 24 cents. Are you

with me?

MR. KENNEY: Yes, sir.

THE COURT: Okay.

In Canada the suggested retail price, as Mr. Posner testified, for albums, would have been $7.29 but was reduced to $6.29, and I am referring to pages 3029 and thereabouts.

Now, that involved, as Mr. Posner said on page 3030, a reduction in the Canadian Company's price to its customers, the wholesale or whatever you want to call it, it would have been $3.69 and it was reduced to $3.16. That isa difference of 53 cents. So there is a reduction in gross of 53 cents. That is different from the reduction in gross on the United States side of 48 cents.

MR. KENNEY: I understand.

THE COURT: Now, is there anything in the record to show me what the reduction in net was? Was it 24 cents, was it less than 24, was it more than 24 on the Canadian side?

MR. KENNEY: The figure that Mr. Posner testified to when he calculated it out was 24 precisely.

THE COURT: Show me the record reference.

MR. KENNEY: I have not yet found it. I recall an exhibit in which this calculation was made based on the entire

sales.

THE COURT: What exhibit?

MR. KENNEY: I am afraid I don't have a reference.

THE COURT: What are we doing here? We came here to grapple with these problems. Get me the facts and the record references. I have come up with more in the last five minutes than you have come up with. I don't have all of your material in my mind necessarily. What is the exhibit that has the 24 cents?

MR. KANZER: The only exhibit I am aware of is 241A, your Honor. As far as I am aware, that exhibit pertains only to the United States. The States at the top that it is based on a $5.98 --

THE COURT: 241A has the 24 cent figure?

MR. KANZER: As you can see by the prices at the top, it is based on a difference in value of $5.98 $6.98, $7.98, and that is a different price structure from Canada's.

THE COURT: Why would the Canadian sales be higher? Why would the prices be higher? Is there an extra cost of selling in Canada, transportation or taxes of something ?

MR. KENNEY: Your Honor, I am not able to testify on this point. I believe it was Exhibit DL which multiplied

out the total number of units times the 24 cents.

THE COURT: But that just takes the 24 cents and applies it to Canada. It doesn't explain whether it should be applied --

MR. KENNEY: For that matter, I am sure that different pressing plants within the United States for Capitol have slightly different costs.

What we have is the United States and Canada costs of 24 cents which was testified to which was relied upon by Mr. Posner when he identified and described --

THE COURT: Did he testify at this point that the 24 cents is a kind of average figure that should be applied to Canada? Maybe he did. I don't know. The point is what is there, if anything, in the record that would lay a foundation for applying the 24 cent figure to the Canadian sales?

MR. KENNEY: I would say --

THE COURT: I think this is one of the things -- I think we are going to have to get together. We did not finally set it, but if we have to get together again this is one thing we have to take up.

The one thing I must say to you, Mr. Kanzer, I assume that with a higher gross it is more likely than not that you have a higher net.

MR. KANZER: I make no such assumptions, Honor, and I also want to point out if it is not in the record I don't see what justification there would be for opening the record to allow Capitol to put in proof at this time.

Capitol, first of all, stated explicitly during the trial that it was not asking for damages in connection with Canadian sales.

THE COURT: You are talking about something different.

MR. KANZER: That is exactly what we are talking about here, your Honor.

THE COURT: I have read through that. I want to say to you here and now that those references are talking about the fact that there is no claim that the unit volume of Canadian sales was reduced by any more than there is a claim that the unit volume of European sales was reduced, but I don't find that is any waiver of a claim that there was damage in Canada as well as abroad by virtue of a price reduction.

MR. KANZER: I don't agree with your reading of it. I also point out Mr. Posner and Mr. Prettyman both seemed to take the position that there was no competition in Canada that required a reduction, that they reduced it in Canada as

a voluntary act because they liked to keep a certain internal structur between prices in Canada and prices in the U.S. That may be a business reason but it is surely not one caused by us.

THE COURT: If I have made a finding which is not justified by the record, it has to be corrected.

MR. KENNEY: Your Honor, I can understand that. Again, though, we start with a 53 cent price differential which is higher. For a while we had a witness with respect to sales of international financed goods and Mr. Schurtman, I believe, or perhaps Mr. Kanzer, questioned that witness as to possible differences in costs with respect to foreign sales and came up with nothing. There was no difference. This was some time ago.

I think perhaps this was an opportunity to explore this issue. We have relied on the 24 cent differential, a conservative differential, if you consider that the gross differential is higher for Canada and we very plainly, without any concealment, used that for Canada as well.

As I say, there are undoubtedly --

THE COURT: Let me just say to you the affidavit does not even meet the issue. The simple question is what is there in the record to justify application of the 24 cent fiture to Capitol, and I don't know why you don't have

that in your affidavit. That is the issue.

MR. KENNEY: It is not raised by the other side.

THE COURT: What do you mean it isn't raised? Paragraph 54 of Mr. Kanzer's affidavit says:

"Consequently, there simply is no basis for this Court to award Capitol 24 cents per album for each of Canadian 65,000 sales of Rock & Roll."

MR. KENNEY: Your Honor, I refer back to paragraph 53, where they complain that there is no evidence that the cost was voluntarily lowered.

THE COURT: They say there is no reason to assume -- the issue is drawn and you have nothing to meet it. I think that is the last.

MR. KENNEY: Your Honor, before we move on --

THE COURT: We will have to come back to the problem of the AFM payments and we will have to come back to this.

MR. KENNEY: Could I make this one statement, your Honor, before we move on?

THE COURT: Yes.

MR. KENNEY: The point we responded to in the affidavit of Mr. Kanzer, are points relating to foreign subsidiaries and points relating to the price reduction was necessary. However, the point your Honor raises is resolved,

we believe these other two points can be quickly resolved now.

THE COURT: I should have made clear I do not give any weight to those other points. It seems to me that I was willing and I am still willing to give Capitol damages based on losses of its Canadian subsidiary. I gave Big Seven damages on the basis of losses of its subsidiaries in different foreign countries to the extent I had any evidence indicating that those amounts could be transferred out of the foreign countries into Big Seven's hands.

So I am not going to have that discussed.

MR. KANZER: Could I just point out --

THE COURT: I do not find there was any waiver by Capitol of this point. So the only point I am willing to explore is whether there is anything in the record which justifies the application of the 24 cent figure to Canada and we will leave that for the moment and come back.

Now, as far as pressing and jacket costs which I think is the last of the points to be discussed, I have read the materials. I don't think there was any deprivation of discovery, any deprivation of opportunity to explore this issue, and the motion as far as pressing and jacket costs is denied.

That leaves two points to explore, and that is

the AFM payments and the Canadian -- the use of the Canadian figure.

What do you want to do on that? I can give you some time Thursday morning.

MR. KENNEY: What time, your Honor?

THE COURT: 10 o'clock.

MR. KENNEY: So that we are sure, this is for consideration of evidence on the point of AFM and Canadian costs, is that the subject of it?

THE COURT: I will permit the plaintiffs to do what I said I would permit them to do, and that is, put in evidence on the subject of the AFM payments, but it is not going to be in the form of affidavits unless the substance of the affidavit is agreed to. You can call your witness in and you can put him on at 10 o'clock Thursday morning.

MR. KANZER: Mr. Zucker is not available. I will have to call somebody else.

THE COURT: You will have to call somebody else. Unless the figures can be agreed to. Maybe they can. I don't know. You talk to these gentlemen.

MR. KANZER: I was under the impression that nobody had yet contested any of those figures.

THE COURT: I don't know. I am not going to have a witness' time or my time or anybody else's time wasted on

testifying about things that should be stipulated. You have got a day and a half to work and I expect absolutely maximum cooperation on stipulating. You have got to face the fact that the record is being reopened. You can retain your objection to that procedure as far as the defense is concerned, but still go forward with stipulating what you can stipulated.

I expect you to do that because I don't have a lot of time on Thursday to give to this. I just expect the parties to work together to get the facts in as simple a form as possible so we can either stipulate or have examination and cross examination that morning.

Then we have one other very simple thing and that won't involve any testimony, just to apprise me what it is, either directly or circumstantially there is in the record which would be a basis for using the 24 cents for the Canadian sales. There may be testimony, there may be exhibits. I don't know. If a witness testified that the 24 cents was an acceptable average figure to be applied across the board, that is testimony. If Mr. Schurtman wanted to challenge it, he should have cross examined that witness.

But the problem I have now is I don't even have any references to anything presented and you have got to get them.

MR. KANZER: Your Honor, could I just ask that if there are going to be any references made to the record that we be given notice the preceding day?

THE COURT: I think you will have to be in touch. You will just have to be in touch with each other and keep each other apprised of what you are putting on.

MR. KANZER: That is fine with me because I certainly would not want to find another situation where testimony is offered or references are offered that we cannot check on that morning.

THE COURT: There are no games. Thursday is it. I want you to be completely open with each other. I want you to talk about this among each other and let each other know what you plan to put on and what your line of proof is and what your line of opposition is so you can come in Thursday and everybody knows what the other side is doing and we can get this over with.

MR. KENNEY: Your Honor, if you speak about a line of proof, I gather in addition to pointing to the record as to the Canadian costs and profits figures, we may also present further evidence on the point, again with the understanding this is something that will be worked out with the other side in advance, explain to them the basis of what we are trying to show.

THE COURT: What possible reason could you have for doing that? That is your problem. You should have completed the record and you rested. If I open it up for you, I am going to open it up for everything on the other side and I am going to do neither.

The only thing I am opening up for new evidence is the one thing where I made a promise to do that. The answer to you is no. If it is not in the record it is out.

MR. KENNEY: I must say the promise was made again at a point --

THE COURT: We have gone into it before.

MR. KENNEY: Furthermore, this point was first raised by your Honor, and perhaps as your Honor reads the affidavit and as Mr. Kanzer says he wrote the affidavit, it is raised now on July 30th by the other side for the first time.

THE COURT: So?

MR. KENNEY: If you are willing to take evidence on a point which they raised several months ago after trial and yet nothing further was done on it, it does not seem to me to be a consistent ruling.

THE COURT: It is not consistent, but that is the way it is going to be. There has to be a cut off. It was up to you to put in evidence. I think we are just repeating

repeating ourselves. I will follow the commitment I made to Mr. Kanzer. I made no commitment to Capitol to reopen the record or let in further evidence and I am not going to do it.

Okay.

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I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

George Wolf

Official Court Reporter
U. S. District Court

gwa 50

BIG SEVEN MUSIC CORPORATION,
et al.

vs.

JOHN LENNON, et al.

New York, August 5, 1976,

10:15 a.m.

Hearing resumed.

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APPEARANCES:

WALTER CONSTON SCHURTMAN & GUMPEL, P. C.
Attorneys for plaintiffs
BY: ALAN KANZER, ESQ.,
MICHAEL HIRSBERG, ESQ., of Counsel

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER, ESQS.,
Attorneys for defendants John Lennon and
Harold Seider
BY: HOWARD P. ROY, ESQ., of Counsel

HOGAN & HARTSON, ESQS.,
Attorneys for Capitol Records and EMI
BY: ROBERT J. KENNEY, JR., ESQ., of Counsel

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THE COURT: We are here today to receive any additional evidence on the point we discussed earlier this week about the alleged deductions from damage awards or alleged deductions that should have been made from damage awards because of claims that

payments would have been made to the American Federation of Musicians.

We have further gathered to see if there is any support for applying the 24-cent net profit-loss figure to 65,000 Canadian units sold.

Now, what about the first point? Do plaintiffs wish --

MR. ROY: If I may address the court on that, I think we are prepared to have a stipulation. But if I may just have a moment to have it clear on the record, if it is not otherwise clear, that we object to the opening of the record. Further, I would just wish to make one other point, because Mr. Kanzer raised it when we met onl the 3rd of August.

Insofar as the underlying issues which Mr. Kenney alluded to in court on the 3rd not having been contained in the papers I submitted on behalf of Mr. Lennon or in the brief submitted by counsel, I would simply wish to state to the court that at the July, I believe it was, 23rd session tbat was held, it was our understanding the court at that time, after first indicating that it wished no papers whatsoever on the matter, at Mr. Prettyman's suggestion indicated that papers should be submittec containing

transcript citations, matters that are in the record. The points that we were raising and the problems that existed vis-a-vis the AF of M were matters clearly not in the transcript and that is why the matter was not addressed.

That being said, solely for the purposes of this case and without prejudice to the rights among the defendants and between the defendants and third parties, including the American Federation of Musicians, by agreement among Lennon, Capitol and EMI, Lennon will stipulate that his award may be reduced by the amount of $9402.20, which is the sum that plaintiffs have asserted in their moving papers.

In so doing defendants do not concede the obligation of any of them to make such AFM payment, the amount thereof or plaintiffs' basis of calculation of the amount plaintiffs asserted therein.

THE COURT: Give me the figure again.

MR. ROY: $9402.20. If I mistaken on that I am sure Mr. Kanzer will correct me.

THE COURT: That is the figure in Mr. Kanzer's payments.

MR. KANZER: I quite agree with the figure. I would just like clarification --

THE COURT: Wait a minute. This would be a reduction in the Lennon damage award?

MR. ROY: Correct, your Honor.

MR. KANZER: I would like clarification of one point in Mr. Roy's statement. When he says that the defendants continue to object to the opening of the record, I do think we should clarify whether they are asserting a right to raise that on appeal or whether they are at this point simply stating that while they are unhappy with the decision, they are waiving all rights to object..

THE COURT: I think it is perfectly clear that they object as a matter of procedure to the receipt of any new factual material in the record on this subject.

Right, Mr. Roy?

MR. ROY: That is correct, your Honor.

THE COURT: I think if you object you have the right to take whatever remedies that are appropriate to someone who objects. I think what they are doing is simply saying if the court is going to adhere to the ruling that evidence will be received, then in view of that they are not going to waste time fighting over factual issues, they want

to retain their position on the procedural issue.

MR. ROY: That is correct, your Honor.

THE COURT: That is exactly what I asked be done.

I appreciate that. I think your position is clear, Mr. Roy.

What that does, let's see, in my decision of April 8th -- I want to see exactly what the award would be amended to. At pages 3473 and 3474 I discussed my award to Mr. Lennon of lost royalties and I awarded $66,000 for the 100,000 additional units which would have been sold and I awarded another $43,700 for loss of royalties because of the price reduction, or a total of $109,700. So the award of $109,700 will be reduced by $9402.20. Let's cut it $7. Let's just say -- let's cut it $2. It will be reduced by $9400. Let's get the net figure.

The result is that in place of the $109,700 figure referred to at page 3474 of the record, the amended figure is $100,300.

Okay, let's go on to the next point.

MR. KENNEY: Your Honor, as you requested, we did gather the record references relating to the basis for the award of damages on the price reduction

in Canada, and Mr. Kanzer has the record references which we intend to present to you this morning.

THE COURT: We have the transcript here and I would just like to have the opportunity to get the transcript and the exhibits as you give them to me.

MR. KENNEY: I think that all of these references are in March 30th, 31st and April 1st transcripts, Mr. Posner's testimony, Exhibit DL and 241 and 241A.

THE COURT: Okay, let's start.

MR. KENNEY: I think that probably the most revealing and briefest way to go through this is chronologically, starting when Capitol first introduced this evidence. That occurred at page 2918 and 2919 of Mr. Posner's testimony.

THE COURT: Repeat that.

MR. KENNEY: 2918 and 2919.

THE COURT: All right.

MR. KENNEY: As is indicated on the top of the page, this testimony occurred after Exhibit DL was marked for identification and Mr. Prettyman began to question Mr. Posner on direct as to the basis for the damage award claims in Exhibit DL.

I would point out that the excerpt upon which we rely specifically here is that which begins at line 23 of page 2918, where Mr. Posner says:

"The first assumption was if Rock and Roll albums had been priced at 6.98, and sold the same units that it sold, underneath that, we mention that it sold 342,000 units in the United States, 65,000 units in Canada, 30,000 in international finished goods for a total of 437,000 units through the end of February."

MR. KANZER: Your Honor, may I suggest that if one then goes two sentences beyond that the key phrase --

THE COURT: Let Mr. Kenney finish.

MR. KENNEY: It is not long, what I plan to go through here.

THE COURT: Why don't you go through your whole presentation and then Mr. Kanzer can respond.

MR. KENNEY: The next sentence is: We multiplied that 437,000 units actual sales by 24 cents. . ."

Then he goes on to explain what the 24 cents is based upon. He states it is based on the difference in price.

THE COURT: Okay.

MR. KENNEY: The issue comes up again at 2925 and 2926, at approximately line 19. This is still Mr. Posner testifying on direct. He states:

"So I simply multiplied the 24 cents times the number of units that we actually sold which is 437,000 units and that totals $105,000."

Of course, he is still referring here to Defendants' Exhibit DL and that computation is shown there.

At this point, on page 2926, at approximately line 8, Mr. Schurtman began to object, asking:

"Are you going to tell me how we arrive at the profit figures? In other words, what your costs are?"

And on page 2927, the following page, your Honor states that Mr. Posner's testimony as to the 24-cent differential is admissible evidence. That is at line 14, where you said:

"I mean that is admissible evidence. Well, it is. And I don't even think it was objected to."

At that point Mr. Schurtman says:

"I am objecting to it right now unless

we get the underlying figures."

And then again your Honor explained the basis upon which you were receiving the evidence, that it was up to Mr. Schurtman to get at the costs through cross examination, if he so desired.

THE COURT: Just a moment. Okay.

MR. KENNEY: We went through in our memorandum to relating to Tuesday's hearing a couple of days in which we gave Mr. Schurtman cost figures and so forth. But the basic point is here that the testimony of Mr. Posner was very clearly based on Canadian sales. There are two statements in the testimony to that effect plus Exhibit DL.

THE COURT: At page 2928 I told Mr. Posner that he had to stay. Anyway, you go ahead with your presentation.

MR. KENNEY: Following that, just briefly it came up again at pages 2930 and 2931, where your Honor asked at the bottom of page 2930, line 24, you asked again:

"And the other elements" -- referring to the price reduction, apparently -- "And the other elements are based on $1.23 profit versus $1.47, right?"

And on 2931 the answer of the witness, Mr.

Posner, was "Yes, sir."

And then he mentioned certain conservative features that he has taken into account with respect to sales.

I think the last reference which I am going to cite in this presentation is on pages 3042 and 3043. This is on the cross examination of MR. Posner by Mr. Schurtman. Mr. Schurtman specifically addressed this issue in his cross examination. Starting at line 20 he states:

"Your alleged loss of profits. Would you look at Exhibit DL? Now you start off with the computation of $150,000" -- I think that probably should be $105,000.

THE COURT: Right.

MR. KENNEY: Continuing the quote:

-- "and that seems to include not only U. S. sales but also Canadian sales and foreign sales."

It was perfectly plain, of course, it did include those sales.

And then Mr. Schurtman states:

"Now, are you claiming damages for Canada

and the foreign sales as well as the U. S.? I am still not clear on that."

Mr. Posner answers at line 5:

"On what we truly sold -- we know we sold to date these units that you see there. All of that first part says had we been able -- had we sold it at $6.98 both in the United States and that would have been $7.29 in Canada and $6.98 to the PX and Armed Services, we would have realized another 24 cents."

Here is the point at which really for the third or fourth time the question arises. Mr. Posner is directly asked on cross examination whether this 24 cents applies to Canada. He states that he takes into account the difference in the Canadian price, suggested retail price, and he answers yes, the 24 cents is used for the computation.

THE COURT: I see that. All right. Anything else?

MR. KENNEY: The only other reference I have, your Honor, is DL and the basic computation which gives you 24 cents.

THE COURT: Okay. Do you have anything to add to what you have already argued in your papers, Mr. Kanzer?

MR. KANZER: I certainly do, your Honor.

I would like to go through the particular citations that Mr. Kenney has just given. Before I take them up, I do want to address the fact that all of these citations were, as he did indicate at the beginning, made with reference to an Exhibit 241A and DL.

If one looks at, first of all, 241A, the most critical thing to notice is at the very top it is based upon album price structure of [illegible].98 to $6.98 for the album and $6.98 to $7.98 for the tapes. S1 all of the calculations that result in the difference between $1.47 and $1.23 are based on a price structure that happens not to be the price structure in Canada.

Mr. Kenney, when he gave me his page references yesterday, did give me pages 3023 through 30 -- 3028 through 3033, which he did not mention today --

THE COURT: 30-what?

MR. KANZER: 3028 through 3033, and if one turns to those one sees quite readily the price structure in Canada, at least for the albums,

was quite different. The price structure for the albums, as one can see, for example, at 3029 --

THE COURT: We have gone through that.

MR. KANZER: I want to emphasize it was a different price structure.

THE COURT: We discussed at length last time that the price structure in Canada on albums is different.

MR. KANZER: Right.

THE COURT: On tape the testimony is it is the same as the United States.

MR. KANZER: That is correct.

THE COURT: I have those figures in mind and as far as the album is concerned in Canada, the comparable price to a $6.98 U. S. price would have been $7.29, and the comparable price to the $5.98 U. S. price was $6.29.

MR. KANZER: That's right.

Now let's go back through the page references Mr. Kenney gave us. Starting with 2918, which is the discussion of Defendants' DL, the very first point that Mr. Posner makes is that this entire calculation is based on the assumption of a $6.98 price, and again, as your Honor has just observed, that is

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not the price for Canada. He repeats --

THE COURT: Let me get the page.

MR. KANZER: 2918, your Honor.

He states this first at line 6, or I should say Mr. Prettyman in his question includes the fact that the exhibit is based on a price structure of $6.98 and $5.98. That is what all the calculations in DL are all about.

It starts, as I say, with Mr. Prettyman's question starting on line 5:

"By way of preliminary on this, Mr. Posner, are these two pages an attempt first at 6.98 and then at 5.98 prices to determine actual damages. . ."

Again, I don't want to repeat each time but of course we are dealing with a different price structure.

Then in his question at line 14 Mr. Prettyman again repeats: ". . . assuming the 6.98 sale."

And again at line 16 he says:

"And the second page assumes a 5.98 sale?"

Now, in Mr. Posner's answer at the bottom of 2918, line 23 to the end, he says:

"The first assumption was if Rock and Roll album had been priced at 6.98. . ."

Then Mr. Kenney stops immediately before lines 5 and 6 on page 2919 when referring the court to the testimony, and that says again:

"That 24 cents is based on had we released the album at 6.98, our unit profit before overhead would have been $1.47 or $1.43."

So I want to emphasize these calculations are again all based on a price structure that didn't happen to be relevant to Canada.

Now, again Mr. Kenney referred the court to the bottom of page 2925, and again did not go to the next page at 2926 where at the top the question that was asked, and this is a question by Mr. Prettyman:

"In other words, $105,000" -- which of course is what this court has found the award to be -- "is the amount that we would have made if the price had been $6.98 instead of $5.98 had we sold the same number of albums?"

THE COURT: Where is that?

MR. KANZER: The first five lines at the top of page 2926, your Honor.

THE COURT: All right.

Anything else?

MR. KANZER: Surely. Again referring to 2927, the passage which Mr. Kenney referred the court to as to the court's own comments about the 24 cents on the average, I think in context it is clear that the court is summarizing testimony which was based on a certain price structure that is again not applicable in Canada.

Now, if we continue to pages 2930 and 2931, also cited by Mr. Kenney, again -- and, for example, I refer the court to lines 18 and 19 -- Mr. Prettyman and Mr. Posner are emphasizing that the assumptions and calculations are all based on a $5.98 sale, not a $6.29 sale as it might have been in Canada. And at the bottom, where the court says, and I am quoting lines 24 and 25, "And the other elements are based on $1.23 profit versus $1.47, right?" the court is referring to Exhibit 241A, because that is where those numbers come from, and again 241A is premised on a price structure for the United States and not a price structure for Canada.

Now, again I want to point out on page 3119, a page that Mr. Kenney did not cite to the court today but which again he did give me yesterday afternoon, I guess, again where there is a reference at

lines 12 and 13 to a price -- well, to a result shown on Exhibit 241 of $1.23 per unit and $1.47 per unit, 241, as it is true of 241A, is premised on a price structure in the United States that is not applicable to Canada.

Consequently, the only thing that even remotely could be considered relevant to the Canada material is the same at 3043, I believe it is, that Mr. Kenney alluded to, which on its face would appear to talk in terms of a 24-cent figure but in context it is clear that Mr. Posner is again referring back to two exhibits 241A and Defendants' Exhibit DL, both of which are based on a price structure in the United States. That's where the number comes from that he is referring to there. He has given not the slightest evidence to the court to suggest that that would be the same figure that would be applicable in Canada.

THE COURT: But he is saying that it is. That's his testimony. He may be wrong but isn't that something Mr. Schurtman could have cross examined about at the time? Mr. Schurtman was presented with an exhibit which has the 25 cents applicable to Canada. He is presented with the testimony of Mr. Posner in two or three places, including 3043,

which expressly states that he is applying to Canada.

Now, couldn't Mr. Schurtman have said, "Why did you do that"?

Of course, you argue Mr. Prettyman could have asked, "Why do you do that?"

MR. KANZER: The burden is, after all, on Capitol to establish its damages.

THE COURT: Right. But there was a great deal of detailed testimony on costs.The further fact is that when it came to the 65,000 Canadian sales, let us face it, nobody buttoned that down as to how precisely it was or why it was used. But as far as a prima facie case or having something in the record, it seems to me that Capitol did put it in the record. It is vouched for by the expert.

Now, I can't take that lightly or assume that this doesn't amount to anything. It is perfectly possible that there a number of reasons why that is in the record and Mr. Posner put it in the record. I keep emphasizing it is in the record. It is in the record. Nobody asked why. But the fact that nobody asked why doesn't mean it isn't evidence.

Now let's go to the question of why.

I can't assume blithely that there was no reason, none. A very good possibility is suggested by what I said the other day. The 24 cents is a difference in net profit. We went through this and I will go through it again.

Before you get to net you have gross. The important figures for calculating both gross and net profit are what Capitol charges to its customers, and the record shows that in the United States Capitol charged an average on tapes and -- I think I am saying this right -- the $3.54 and $3.06 averages on tapes and disks, are they not?

MR. KENNEY: Yes, your Honor.

THE COURT: In any event, the $3.54 and $3.06 figures represent what Capitol would have charged if it had had the suggested list of $6.98 and so forth on albums and tapes -- $6.98, $7.98, and $3.06 is what it actually charged after the price reduction, a difference in tross of $4.08.

In Canada the evidence is that if the price structure had been the normal price structure, which would have been $7.98 for tapes and $7.29 for disks, Capitol would have charged an average to its customers of $3.69.

Then the prices were reduced to the $6.98 for tapes and $6.29 for disks, it charged an average of $3.16, giving a difference in gross of 53 cents. That's a greater difference in gross.

If somebody, Mr. Prettyman or Mr. Schurtman, had said, "Why did you use 24 cents for the difference in net in Canada as well as in the United States?" Mr. Posner might well have said, "It probably was greater than 24 cents but simply to simplify things we used the 24 cents."

In other words, a greater difference in gross I would tend to think would indicate either the same or greater difference in net. I think the cost figures have been given and there is no reason to believe that the slightly higher gross figure in Canada would have led to slightly lower net figures. Nobody bothered to go into that, probably because they didn't want to take the time to do it. It was equally true of Mr. Schurtman as of Mr. Prettyman. But I can't sit here and say that there is nothing in the record to support the finding I made.

If you want to go into this in further detail, let's look at 241A.

Could I have the original exhibit?

Does anybody recollect what that exhibit is all about? That's the source of the 24-cent figure and that has this listing of Capitol's unit prices before and after the price reduction in the United States, $3.06 and the $3.54, or vice versa, the $3.54 and the $3.06, and it has two columns, one detailing variable costs before and after the price reduction and the differences in those costs.

Now, the nature of those costs does not lead me to believe that they would have been radically different in Canada. I assume most of those costs for the Canadian sales were incurred in the United States, and I think if Mr. Schurtman had decided or anybody decided to go into this in detail they probably would have found it was rather unproductive, it didn't make that much difference, so everybody let it go at the 24-cent figure.

That's what really happened here. Somebody could have created another cost sheet for Canada or Mr. Prettyman could have done that or had his witness do it. Mr. Schurtman could have asked that it be done. Nobody thought that it was that important and I have got to assume it probably wasn't.

So I want to just take a minute. Have you

all got your copies of Exhibit 241A?

MR. KENNEY: Yes, your Honor.

THE COURT: Let's review what this shows. At the top you have these two columns. You start out with Capitol's cost of before and after the price reduction of $3.54 and $3.06. What are the figures beneath? How do I arrive at the net profit figures down below of $1.47 and $1.23? What do I subtract from what?

MR. KENNEY: Your Honor, you subtract the total variable costs figure, taking the lower price column first. The total variable cost figure is $1.82. You subtract it from $3.56, which is the net sales figure.

THE COURT: You mean $3.06 cents?

MR. KENNEY: No, your Honor. The net sales -- $3.06 is the invoice sales figure, which is the very first figure in that column. Then you see that there is a calculation which makes a difference of a penny.

THE COURT: So you have got a net sales figure after certain discounts and provisions of $3.05, right?

MR. KENNEY: Yes, your Honor.

THE COURT: So you take the $1.82 and subtract it from $3.05 and you get $1.23.

Then in the next column you do the same exercise, you take $3.53 and subtract what, $2.06?

MR. KENNEY: Yes, your Honor.

THE COURT: What are the elements of difference? There is a difference of course of 24 cents. What are the elements that go to make up that difference?

MR. KENNEY: The difference is made up of only one element, which is the higher invoice sales price that you start with. You start with your gross difference of 43 cents and that is whittled down by the increased cost associated with the higher price.

THE COURT: I have got this Xerox of 241A and we are having trouble now trying to locate the original. After the hearing would the lawyers try to help my clerk get the original Exhibit 241A. We want to make sure that isn't lost. We will suspend looking for that now.

So the main reason for the difference between $1.23 and $1.47 is the difference in sale price, right?

MR. KENNEY: Yes, your Honor. I think that there may be even -- just to make absolutely sure of that, I was checking to see if there were any instances where, for some odd reason, the cost would be lower, but I don't think there are any. So really the whole difference would be accounted for initially by the difference in the invoice price.

THE COURT: You have some difference in royalty. There is less royalty paid on the lower cost record, right?

MR. KENNEY: Yes, your Honor.

THE COURT: Then you have a slight difference -- in other words, there are some of these costs that are based on percentages of the sale price of the record, isn't that right?

MR. KENNEY: Yes, your Honor.

THE COURT: For instance, royalties, pressing fee, those would be the main ones.

MR. KENNEY: I think the advertising is as well, your Honor. You will notice in the method --

THE COURT: They did strike a percentage on the allocation of advertising.

MR. KENNEY: Yes. The only one that

isn't based on a percentage, as I understand it, is the packaging deviation line. What is reflected here is just the increased costs would have been associated with manufacturing the higher-priced album.

THE COURT: I would say this with considerable confidence, that I see nothing here which would indicate that there was some substantial variation in the costs of selling the Canadian records between what is listed here in the two columns and what would be true if you got an express, explicit list made of the cost of selling per unit in Canada. I don't think that is guesswork: I think it is a reasonable inference that these basic costs were incurred the same for selling south of the Canadian border and north of the Canadian border and for some reason there was a slightly different, not greatly different, but there was a slightly higher suggested retail price and wholesale price in Canada for the disks.

Now, exactly why that slight differential occurred was not explored, but it is not -- but there was no differential as far as tapes. So your differential is simply for the disks. I think there is no justification for me simply striking out com-

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pletely a damage award on the basis of that -- the damage award related to the 65,000 Canadian units. So I will deny the motion to amend the findings in that regard.

This leads us to getting the judgment signed.

MR. KANZER: Your Honor, may I hand up to the court an affidavit and a brief in opposition to the proposed judgment. I have served copies.

THE COURT: Let's just go through it. What are the problems?

MR. KANZER: Your Honor, there are quite a few. First of all --

THE COURT: Where is your proposed judgment?

MR. KANZER: We have not submitted one. We have simply given our objections.

THE COURT: You go down. What is your first objection? I am on page 1.

MR. KANZER: To take them up in a different order from those in our papers, but I will ultimately cover the same ones, I would first like to address myself to the question of the interest, first of all, whether interest is due on all of the claims and, second, if so, from what date.

The first thing I would like to note is as to the punitive damage award we contend that no interest at all is due on that. The purpose of interest of course is to put a person in the position he would have been had he received what he was entitled to on the date on which he was enttitled to it. Punitive damages, fo course, are not compensatory by definition. Their objective is not to restore somebody to a position he would have been in but for the wrongful act but rather just to punish.

THE COURT: I will not allow interest on punitive damages.

MR. KANZER: The next one I would like to address myself to is the civil rights claim and the interest question on the civil rights claim.

There we have cited cases that take the Position that what interest is meant to do is to, again, be used in situations where there are economic losses rather than personal losses, and the Warren Spahn case, which involved the pitcher Warren Spahn is a leading case, ultimately affirmed by the Court of Appeals, to deny any interest at all on a situation where basically what was involved was the personal damage to reputation of the plaintiff.

Here we have a situation where the court did not find any specific economic loss suffered by Mr. Lennon.

THE COURT: I will not award interest on the civil rights claim.

MR. ROY: May I be heard on that?

THE COURT: Yes.

MR. ROY: I must confess that I am not as conversant as Mr. Kanzer is with the Warren Spahn case. I am certainly familiar with the facts of the case. It is clearly a distinguishable situation from the one that exists here. The Warren Spahn case, if my memory serves me correctly, Mr. Spahn was suing on the basis of a biography that was both unauthorized and fictionalized. Mr. Spahn, I think Mr. Kanzer will not dispute me, is a famous baseball pitcher. He was not a writer of books, biographies or anything else.

In this case the invasion of privacy which gave rise to the cause of action of Mr. Lennon and for which you are awarding Mr. Lennon damages involved invasion of the same type which is the manner in which Mr. Lennon earns his livelihood. Your Honor found -- and, if I may, I refer you to page marked 3482 to

3485 of the transcript of April 8th -- your Honor stated, in making the award to Mr. Lennon -- I am sorry -- the sentence begins on 3441:

"There is no doubt in my mind that this situation has caused damage to Lennon's reputation and has produced some damage to him as an artist."

I read that to mean, your Honor, you found there was a direct economic loss to Mr. Lennon.

THE COURT: It doesn't make sense to me to award interest. There wasn't any amount of money owing, there wasn't any amount fixed, there wasn't any indebtedness until -- and there wouldn't be on that particular item until I sign a judgment. It just doesn't make sense to me to award interest on the Civil Rights Act claim and I just decline to do it.

MR. KANZER: The next point I have, your Honor is interest in connection with lost profits, and I will take them separately for Capitol and EMI, if I might, your Honor.

The general rule in New York is that lost profits do not give rise to interest until the time when they are judicially ascertained for the simple reason that, again, interest is supposed to put somebody

back in the position that he would have been in.

Here we have a stiuation where Capitol, but for the activities of Adam VIII and Morris Levy, would not have realized the additional 100,000 sales and all of the profits incident to the additional dollar of purchase price or, I should say, retail selling price on the day it released this album. Their profits, if they would have earned them, would have been earned over a series of times, a time interval which at least for the purposes of the calculations which Capitol has used in this case were the period of February, 1975 through the end of February, 1976.

It was throughout that entire period of time that Capitol presumably would have, if the court is correct, sold an additional 100,000 albums and would have realized the profits that resulted from selling the additional 100,000 albums.

THE COURT: The only way you can h elp me -- in principle interest should be awarded on this. We are going to have to do an estimating job in figuring out a date.

What I think we have to recognize here is that the bulk of the sales occur early and then what occurs late is very often returns. I don't know

how the cash flow occurs. When I say I don't know, I think we can draw inferences from the record. There is a lot in the record about how the business is done. I think we can draw inferences so we don't have to call a bunch of other witnesses. The sales, the bulk of the sales, would be made reasonably early and it seems to me that the interest should start running from some time like -- we have to pick a date and I suppose --

MR. ROY: Excuse me, your Honor. If you will recall, with respect to the award made to Big Seven, the date indicated in your Honor's opinion was, I believe, the date of February 15th, and I think the evidence on this is a day or two away, but in that area, the date of the release of the Rock and Roll album. The reason our judgment uses as a starting point is, one, because it seemed to us in preparing it that your Honor, in making the specific mention of the interest date with respect to the Big Seven claim, was choosing the date when the cause of action arose, not necessarily, because it is very difficult to do so, as you have just indicated, trying to figure out exactly on one date and then the next date exactly how many returns or how many sales.

THE COURT: Do you have the copy of my statement on that?

MR. ROY: I think so.

MR. KANZER: Obviously we take the position that whatever date it is should be the same, but we do not particularly take the position that your Honor was correct in giving us interest from that date. We really dn't think that would be the appropriate date.

MR. ROY: I think Mr. Kanzer's generosity is due to the dollar we are dealing in, but that is not the criterion upon which the determination should be made.

MR. KANZER: I also want to refer the court -- and I am sure the court is familiar with it -- to page 2972, where the court does observe, with reference to 90-day material which you just mentioned, that you don't know how the 90-day sales correlate with ultimate sales after all the returns are made, which again is the point that while Capitol did claim it had normally high initial sales, it is very, very difficult to figure out how those sales really resulted because, remember, the sales that Capitol was talking about were not real sales in the sense of what was

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actually purchased by the consumer; they were shipments made to its dealers, shipments which the dealers had an absolute right to return. There was no indication in the record as to when the dealers actually paid for those shipments. In other words, there is nothing that says that shipments are paid for when received. Quite the contrary, it's my understanding in the industry that payments are made over an extended period of time and usually only, in many cases, after the dealer decides how many he is actually going to sell and return. There were 122,000 returns.

THE COURT: With respect to the initial stages, Capitol sells records to people and the initial burst of sales is supposed to be the heaviest. When I say initial I am not talking about the first five minutes that Capitol sells.

There is nothing to indicate to me that an obligation on the part of Capitol's buyer or buyers doesn't accrue in the normal course of business. There is nothing to indicate that the obligation of Capitol's buyers to pay Capitol is an obligation that they just -- that there are six or nine months' credits. I don't know the exact credit arrangements but

I don't think the problem is sufficient to call witnesses back on the subject of interest on the judgment. On the other hand, I think I probably was in error on the February 15th date, when I awarded interest on Levy's claim beginning February 15th. Obviously the royalties would not have come in on February 15th.

I think the way to do it -- and I would certainly give the benefit of the doubt to the people who have to pay the interest -- I would say fix it 90 days after February 15th, something like that.

MR. KANZER: May I suggest 180 days?

THE COURT: Fortunately, we do not have a case which we are trying eight years after the events. We can all be thankful for that. This case was tried reasonably quickly and the amounts of interest are not very, very heavy. But I do think as a matter of principle that interest is required on the Capitol claims for loss of sales and the Lennon for loss of royalties and, as I already said in my July 13th opinion, I think that Big Seven is entitled to interest on that small judgment on lost royalties.

MR. ROY: If I understand correctly, you say you will take from February 15th 90 days thereafter for both the award to the defendants for pre-

judgment interest as well as for the award to Big Seven?

THE COURT: Right. I am doing that because I don't think there is any way I can be terribly precise. The cash flow would have come in at different times and I am simply striking a date which I think has a reasonable basis in the record.

MR. ROY: Your Honor, if I may, I would point out there is a basis certainly in the New York procedural CPLA 5001 which I would submit governs on these pending claims.

THE COURT: What's that?

MR. ROY: It indicates that you have discretion to strike a balance just as you are doing with damages on different dates. It also indicates principal can be applied to ascertain the earliest date. I can read you the section.

I am pointing out certainly there is legal basis for using the 90-day figure as well as using the earlier date when the action arose.

MR. KANZER: Could I just call to your attention a few cases that I think are pertinent on this.

THE COURT: All right.

MR. KANZER: I would like to --

THE COURT: What do they say?

MR.KANZER: Basically they say that where you have a situation of lost profits, interest should be computed from the date that the total damages were sustained, and that is the position that we would like to urge on the court, that if on February 29th is the date Capitol has used as the sales date, to February 29, 1976, we would urge that is the date that should be used.

I can either give you the cases orally now or simply point out they are all in the brief. I can read portions of them to you, if you would prefer.

THE COURT: What do you say?

MR. KANZER: February 29, 1976 I believe is the date Capitol used in its exhibit as the date as of which it computed the 324,000.

THE COURT: That isn't realistic because now we are talking about when Capitol would have gotten paid and when Levy would have gotten paid all or most of the lost -- and when Lennon would have gotten paid the royalties, the profits and so forth. What I am holding is that I think I can draw a reasonable inference that the great bulk of the sales occurred

in the early period after the release of an album and that there are certain additional sales and certain returns that occurred thereafter. But I am talking about what would have been done with respect to an additional 100,000 sales and I don't really have any reason to believe that that would have all piled up at the end of a year period.

So I think that in the interest of getting this matter concluded and drawing some reasonable inference from the record I will hold that interest on the Capitol compensatory damage claim and on the Lennon claim for lost royalties and on the Big Seven claim for lost royalties, all of that interest starts running on May 7, 1975.

Now let's get to the other parts of the judgment.

MR. KANZER: May I point out there may be a distinction your Honor should draw between the Capitol award and the Lennon and the EMI awards for the following reason: You are quite correct that Capitol does receive its moneys on a current basis, or at least we will assume, since there is nothing in the record, that Capitol is in fact paid at some reasonable point by the people it sells to. The

industry practice on royalties -- and there is evidence in the record; I don't have the citations now but Mr. Levy and others did in fact -- I believe Mr. Bergen emphasized his testimony to bring it out -- is you pay royalties twice a year and I believe it is 60 days or so after the middle of the year and 60 days after the beginning of the year. In other words, Mr. Lennon would not have been receiving his royalties from Capitol as early as you are suggesting.

THE COURT: What about that?

MR. ROY: Your Honor, I am not -- I can't speak to you what the internal accounting practice is vis--vis payment to Mr. Lennon or Apple by Capitol. I am sorry. I am just simply not familiar with that. Perhaps Mr. Kenney is.

MR. KENNEY: I must say I am not. However, without having any particular citations to the record on this, I find it difficult really to respond.

It does occur to me, though, that I wonder if Mr. Kanzer recalls any evidence in the record as to the terms upon which the semiannual payments are made. Certainly this would make a difference. If there are some terms inherent in the payments, interest terms,

it would go to the point.

MR. ROY: I do recall there were discussions with respect to semiannual payments but those were in respect of mechanical royalties to be paid to the copyright owner for the song being recorded. I don't recall there being testimony in the record concerning the date of payment of royalties to the performing artist.

THE COURT: Do you know the citation on this?

MR. KANZER: I could not possibly right now. I do know industry practice to some limited extent. I certainly don't want to be a witness.

THE COURT: What was the thing you told me before is in the record?

MR. KANZER: I said my recollection of the record -- and it may be it specifically referred to mechanical royalties, but it is my understanding mechanical royalties and artist royalties are paid at the same time, that the normal practice is that royalties are payable to an artist twice a year: they are payable at the beginning of the year -- I believe it is 60 days after the beginning of the year and 60 days after June 30th. It is close. It

may not be the exact date.

Further, your Honor, industry practice is for the company to hold back a portion of the amount due because of potential returns. So the chances are we would be happy to produce somebody to testify as to that.

THE COURT: What is the interest rate?

MR. KANZER: Half a per cent a month. So we are talking about what could be -- it is 6 per cent, which is half a per cent a month. So we are talking about, let's say, a difference of six months. We are talking about 3 per cent of the award. Three per cent of, let's say, Lennon's award -- I don't have the numbers in front of me.

THE COURT: It is about $100,000.

MR. KANZER: You are talking about $3000 difference in interest as to Lennon if you make it more than the date requested.

THE COURT: I think that in view of that representation, and I am not going to have another witness and have another hearing on this, and I think that Mr. Kanzer's point is probably well taken, that there would be some lag between Capitol getting its money and the payment of royalties, and there is no

indication that royalties are paid monthly, I will have the interest on Mr. Lennon's judgment for lost royalties run from August 1, 1975.

MR. KANZER: As to EMI, their pressing royalties, which is what the pressing royalty amounts to, there is nothing in the record to indicate when it would be payable.

Again, it is very doubtful that all pressing is done at the beginning of the period. I think pressing is done as records need to be produced.

THE COURT: Let's cut this off. We have got to get this case over with . I think we could spend a lot of time and we wouldn't have anything that would be too precise in any award. I will award interest on EMI beginning August 1, 1975. We are going to have interest at 6 per cent per annum on the Capitol compensatory damage award, which is the only Capitol award because there weren't any punitive damages to Capitol.

MR. KANZER: There was a punitive award but you did not award interest.

THE COURT: Then I misspoke. The Capitol compensatory damage award, interest is to run from May 15, 1975, on the Lennon lost royalty

award and on the EMI award the interest will run from August 1, 1975.

Anything else?

MR. KANZER: Two other points not relating to interest, your Honor.

First, the proposed judgment conditions the payment by Lennon to Big Seven upon Adam VIII and Levy making payments to Lennon. I know of no possible justification for that. They are independent obligations, they are different parties. I vehemently object to that.

MR. ROY: Your Honor, may I address myself to this? This is a matter of great concern to us.

THE COURT: Yes.

MR. ROY: If you examine the manner, the way in which we have structured the proposed judgment we have submitted, what we have said is that there is an award made to Big Seven in the amount of approximately $6000, whatever it was your Honor had specifically awarded. Then it further says that such amount shall not be payable until after the award made to Lennon is satisfied.

The reason for this, your Honor, is that

throughout this trial, indeed, in your Honor's decision rendered in this trial, everyone has recognized and everybody knows that Mr. Levy runs Adam VIII and it is a vehicle through which he conducts his business, that Mr. Levy runs Big Seven and it is a vehicle solely for the conducting of his business, and it would be unconscionable, your Honor, to have the potential of Mr. Lennon, who is clearly solvent and responsible and able to answer the judgment in the amount of $6700, be in the untenable position of having paid to Mr. Levy when he is wearing his Big Seven hat that amount of money only to find it is 1985 and he is still chasing Mr.Levy in supplementary proceedings.

THE COURT: Let's get to it in a broader way. The court is going to have to face the question, Presumably, of appeals and supersedeas bonds. Let's cover that right now.

MR. KANZER: We have every intention of taking an appeal on filing the appropriate bond. Consequently, I cannot conceive of the risk that Mr. Roy seems to be worrying about.

THE COURT: What will the amount of the bond be?

MR. KANZER: That is determined under

the local rules, your Honor. I don't happen to have it with me. I think it is 31 of the local rules.

MR. ROY: It is Rule 33, your Honor.

MR. KANZER: I think there are several.

MR. ROY: It is 33 or 37.

THE COURT: Civil or general or what?

MR. KANZER: The bond must be 111 per cent of the judgment plus $250 to cover costs. I can't conceive how they can be hurt.

THE COURT: In other words, you are definitely going to appeal, right?

MR. KANZER: As of the moment it is our firm intention. I cannot speak for the client to guarantee it, but, your Honor, if we don't they can take execution within 10 days after under Rule 62(a), there is only an automatic stay for 10 days.

So we are talking about, since the judgment is to be entered tomorrow -- we are talking about Monday, August 16th. I hardly think, since we of course cannot take execution on Mr. Lennon until the same date, that Mr. Lennon need worry about it. Besides, your Honor, I will point out -- and I don't have the research because it never occurred to me they would take the position -- there is no authority in

the court to stay execution on a judgment against Mr. Lennon. I had the identical situation come up in the Ninth Circuit where one of our clients got a judgment against another company which on a counterclaim got a judgment against one of our clients. We took an appeal, they did not. They asked the district court judge to stay execution against them until such time as the appeal was decided.

The district court held -- and I can give you the citation; insofar as the name of the case it is K & L Distributors against Lowenbrau, we represent Lowenbrau in that -- I can tell the court that the district court of the District of Washington held that it had no authority to issue a stay of execution of the judgment when it was not appealed.

THE COURT: I think in view of the fact I am leaving I am entitled to get representations as to securing the judgment which will be entered today against various parties.

The judgment on the Lennon, Capitol and EMI counterclaims will be entered against whom?

MR. KANZER: Adam VIII and Levy, your Honor.

THE COURT: I understand that Adam VIII

and Levy intend to appeal?

MR. KANZER: They certainly do, your Honor.

THE COURT: That means that they will provide a supersedeas bond securing the judgment?

MR. KANZER: They have every intention of doing it.

MR. ROY: Excuse me.

THE COURT: Just a moment. A supersedeas bond in the amount of 111 per cent of the judgment?

MR. KANZER: Yes.

THE COURT: When do they intend to file that bond?

MR. KANZER: Your Honor, unless the court stays the enforcement of the judgment beyond 10 days, we would have to file it within that 10-day period to protect ourselves against have execution on the judgment.

We do have one problem. Your Honor said you would be entering it today although it is noticed for tomorrow. It does make a difference to my client in the following respect: If it is entered today we would have to protect ourselves, file the supersedeas bond by Friday, August 13th. Otherwise

it would be August 16th. Your Honor, the difference in the three days is material in one respect. The secuity we are going to be posting with the bonding company to enable them to be willing to write the bond consists primarily of U. S. Treasury bonds that have an interest payment date on August 15th, which would be on that Sunday. They will not give us any credit for accrued interest.

If, on the other hand, we file the bond on the 16th we will receive full credit for the interest. The interest involved is, I believe, $30,000 and it would mean that we would have to dig into -- the clients would have to dig into their pockets for an additional $30,000, the security ultimately being the same, the 111 per cent that they would later receive their credit.

THE COURT: Let me ease your pain. The judgment was noticed for tomorrow and it will be entered tomorrow.

MR. KANZER: All right.

THE COURT: I think that is fair enough.

MR. ROY: May I just ask a question?

THE COURT: Yes.

MR. ROY: What perturbs me is when the court a moment ago pressed Mr. Kanzer and said, "Are you going to post it, are you representing to me you will post it?" Mr. Kanzer began with "That is our present intention." What we have proposed in this judgment, the thing that makes me so adamant and the thing that creates fear is that Mr. Kanzer is objecting to the way we have structured this.

THE COURT: He says that there is no legal authority for doing it this way and I don't know that there is any legal authority.

MR. ROY: I submit you have the inherent power to protect the integrity of these proceedings as well as govern the manner in which your judgments will be enforced.

THE COURT: I won't do it that way. I think that would be disorderly and I will not condition the payment of a judgment to Big Seven on payment of a judgment by Adam VIII and Levy.

On the other hand, Mr. Kanzer, I want to -- I am trying to get some reasonable assurance as to the conduct of the parties in the next few days so that we don't have to have people rushing to the Part I judge who has no background in this at all. I think

I am relying on your ability to speak for your client, and you have given me certain assurances and I am willing to be fair with you. I certainly am willing to have the judgment entered tomorrow so that the 10-day period doesn't run out until the time that these securities are due. I don't see any reason why Mr. Levy loses his interest. That's fine with me.

But I also want to ask you, I assume that there will be nothing done between now and the time when execution can start or when a supersedeas bond commences. I assume that there will be nothing done to try to avoid responsibility for this judgment.

MR. KANZER: Your Honor, the clients have been aware of your decision since April of this year. To my knowledge, they have made absolutely no attempt to dissipate their assets. They have no reason to. They have been doing everything they can to raise the money to file the supersedeas bond. I have had I don't know how many discussions with the clients about what the terms of the bond are, how much security they have to post. I would be absolutely astonished if simply because a judgment is going to be entered tomorrow that that would in any

way change the clients' attitude, which is firmly to take an appeal. I would be absolutely astonished if anything were to take place.

THE COURT: So to the best of your knowledge there is no step taken heretofore and no step to be taken now to avoid responsibility?

MR. KANZER: We will take steps to post the necessary security.

THE COURT: Your present intention and your client's present intention is to take an appeal and file a bond a week from Monday, is that right?

MR. KANZER: That is correct. I can further give the court assurance I am going to firmly recommend that the appeal be taken, and there is nothing that has occurred heretofore that will change that recommendation.

THE COURT: If the appeal isn't taken, then of course, execution rights start as of that date.

MR. KANZER: That is right.

THE COURT: As far as the judgment against Lennon, execution on that cannot be carried out for the 10 days, right?

MR. KANZER: That is correct. It would

also become due on the 16th, your Honor, and it would of course be our intention to execute on it unless Lennon is going to take an appeal.

THE COURT: Do you know whether you will appeal from that, Mr. Roy?

MR. ROY: Your Honor, I don't believe that decision has been made.

THE COURT: I want to say that I think you are in the same position. Mr. Roy, if Mr. Lennon is going to appeal from that, he can put up a bond. If he is not, he owes the money. If Monday arrives and he decides he is not going to take an appeal, then he owes the money. But as far as amounts owed to him, I am counting on them being secured. That is as far as I think I can legally go.

MR. KANZER: There are two other points, your Honor. The first is the scope of the injunction relief that they are requesting.

The first point I would like to observe, your Honor, is that they are asking for injunctive relief against Big Seven which the court did not award at all. The court awarded injunctive relief solely against Adam VIII and against Levy. There is no foundation in this record for any injunction

against Big Seven. Big Seven has assigned all of its rights. There is no justification for asking for an injunction against Big Seven and I object.

THE COURT: I think there is support in the record and I think the support is that according to Levy he initially dealt with Big Seven.

Right?

MR. ROY: That is Mr. Levy's testimony.

THE COURT: Whether that is true or not, at least that is his testimony, and it seems to me for the sake of the injunction it is a worthy precaution to have the injunction entered against all parties who were involved, according to the record, at least according to Mr. Levy's representation, in this activity.

MR. KANZER: Your Honor, could I refer your attention to pages --

THE COURT: Look, I just think it is a necessary precaution. I think even if Big Seven were not expressly covered by the injunction, Big Seven has knowledge and would be bound. It seems to me not even worth talking about.

I will enter the injunction against Big Seven.

MR. KANZER: We now object to the scope of the injunction. The court, when it awarded the injunction, stated that what it was awarding was an injunction, and I read now from page 3477 of the transcript:

"All the defendants who have asserted counterclaims are entitled to an injunction against Adam VIII and against Levy forbidding any further marketing or advertising or promotion of the Roots album."

We don't object to that, your Honor. Obviously since you have awarded it the judgment should have incorporated it. What the defendants have done is go tremendously beyond that. They have set up an accounting procedure, they have set up affirmative duties that my clients would have, that they have to turn over certain things, they have to destroy things. This is totally beyond the scope of anything that the court awarded.

Among other things, they say that my clients cannot use the name, picture or likeness of John Lennon and don't take into effect our client may legitimately purchase such rights from somebody who has a right to do it. This is an utterly blanket

injunction that is totally beyond what is called for, beyond what the court has ever indicated. I think the injunction should be what the court stated.

THE COURT: Let's take a recess and we will come back.

(Recess.)

MR. KANZER: Your Honor, during the recess I have had a discussion with defense counsel and we have agreed on one change.

THE COURT: What is that?

MR. KANZER: On page 4 of the proposed judgment, in paragraph 7, it is about the ninth line down, where it states, "The name, picture and likeness of John Lennon," we would suggest before the comma put in a parenthesis and the following statement in that parenthesis: "unless such right is hereafter lawfully acquired in writing."

THE COURT: So it comes after what word?

MR. KANZER: After "Lennon" and before the "or."

The purpose of this change --

THE COURT: Just give me the words again.

MR. KANZER: Surely. "Unless such right is hereafter lawfully acquired in writing."

THE COURT: I have got that.

MR. KANZER: The purpose is to reflect the possibility there may be legal means by which Mr. Levy can get the rights in the future.

There is no agreement as to the balance.

THE COURT: I want to go through with you some other changes quickly. We will just settle this judgment now.

On page 1, no change.

On page 2, paragraph 2, I have got this marked and I will give it to the lawyers but I want to read this into the record.

The last five lines of paragraph 2 are to read as follows:

"Punitive damages, for a total award of damages equal to $237,000 with interest on the $227,000 from May 15, 1975, at the rate of 6 per cent per annum as provided by law."

On paragraph 3, the last five lines will read:

"Damages, for a total award of damages equal to $37,500 with interest on the $27,500 from August 1, 1975, at the rate of 6 per cent per annum as provided by law."

In paragraph 4, the figure of $144,700 in line 4 is changed to $135,300, and the last five lines of that paragraph read:

"Total award of damages equal to $145,300 with interest on $103,000 from August 1, 1975, at the rate of 6 per cent per annum as provided by law."

Paragraph 6, the last lines read as follows:

"With interest thereon from May 15, 1975, at the rate of 6 per cent per annum as provided by law."

Now let me discuss with you paragraph 7. I think the first part is overly worded and I propose to put the word "and" between "assignees and attorneys" and strike the language "those persons in active concert or in participation with them and each of them be and hereby," and so forth. So it just reads:

"Assignees and attorneys are permanently restrained," and so forth.

I see no reason, down a little farther, for the words after "devices," "whether or not known," so I have stricken that out.

MR. ROY: I believe that is standard in business and it does have a specific meaning.

THE COURT: We will leave it in.

We have inserted this thing that was put in by agreement.

We come down to the end and the only Problem I really have at the end is confusion about the time periods. You have the date for delivery of -- incidentally, I am in full agreement with the defendants on their proposal as far as delivery of materials, accounting for location and disposition of materials and so forth. So I want to make that clear. The only thing I find there is a little confusion about the date when things are to be done.

There is a provision about delivery of the materials following the completion of all proceedings and/or appeals herein, and then accounting within 60 days hereof. That doesn't make sense.

MR. ROY: I think it should be "thereof." I think the intention there is to have the 60 days follow from the date that the materials are delivered.

THE COURT: So we strike "hereof" and put in the words "following delivery of the above materials."

Okay?

I am going to give you the judgment as it

stands and as I have approved it, and I think --

MR. KANZER: I have a couple of other points.

THE COURT: You had better get this retyped, get it back to my office early this afternoon so I can approve it and it gets down for the clerk's entry tomorrow.

MR. ROY: Thank you very much, your Honor.

MR. KENNEY: Before we close, I don't think it is clear on the record that on behalf of EMI we are objecting to the August 1st date for the computation of interest.

THE COURT: All right.

MR. KANZER: I still have a couple of points.

THE COURT: What?

MR. KANZER: First of all, I do want one clarification. In the injunction, when the word "accounting" is used I do want at least the record to reflect that this does not mean a financial accounting in the sense of an accounting of profits, only an accounting of physical --

THE COURT: What language do you sug-

gest?

MR. KANZER: As long as the record is clear, that will probably suffice.

MR. ROY: That is all we are asking for.

THE COURT: That is my intent. It is clear.

MR. KANZER: The other thing, on the judgment, your Honor, paragraph No. 1 denies Big Seven recovery of its costs. Big Seven is the prevailing party against John Lennon and it is our understanding of the law that Big Seven is entitled to its costs. I don't see any justification for refusing them.

THE COURT: What costs would that be?

MR. KANZER: Whatever the legal costs are that a party is entitled to.

MR. ROY: May I speak to this? In the first instance, the awarding of costs is discretionary. Directly to the point Mr. Kanzer is raising, the costs to which, if they were awarded, they would be entitled would be on the matters as to which they prevailed, as to which we had a separate portion of the proceeding, a very, very small part of it, some two days or three days.

THE COURT: What costs are you seeking?

MR. KANZER: I have not investigated what the legal costs are a party is entitled to, your Honor.

THE COURT: Filing fees?

MR. KANZER: Your Honor, I confess I have not researched the question as to what costs a party is entitled to. Whatever they are, we claim we are entitled to them the same way as they are entitled to them.

THE COURT: You can't come in and blandly speak in that way. In the grea' bulk of the issues raised in this case the defendants prevailed in terms of money, in terms of trial effort, in terms of whatever you want to say.

I don't know, sitting here, how you go about allocating taxable costs so that you would recover the costs you are entitled to on your claim on which you prevailed and they will get costs on the other things. What I have in mind is the original complaint which charged breack of an October 8, 1974 contract, the filing fee related to that.

I don't know what depositions were taken but they undoubtedly were thought by everybody to relate to that matter at that time and the counterclaims,

and how you figure out what costs are related, I don't want to put a provision in blind. I don't know what you are talking about.

Let us suppose there is a dispute. How do you suggest that that dispute gets resolved and when?

MR. KANZER: I believe that the time when it would probably come up is when any party asks for his costs. What one has to do, as I understand, is one prepares costs, one submits it to the clerk and the clerk makes a decision. At that point, if anybody objects the rules provide he has five days in which he makes a motion to object to the allowance of any specific cost. I would suggest we handle it exactly in that manner.

THE COURT: I am just not of a mind to award Big Seven costs. I think it was a matter of grace, really, they were permitted at a late date to really change the theory of their case and assert a claim based on the October, 1973 agreement. That was contrary to the theory on which they originally started the action. It was asserted after they had lost the original action. It was asserted and allowed because I felt that all disputes here should

be wound up.

The whole procedure of coming in on one theory and then, after losing, asserting a completely contrary theory created, obviously, a lot of litigation which the court was obliged to here and everybody was entitled to preser.

I think th . l would be well advised to deny costs on the Big Seven amended claim for lost royalties on the come-together settlement of October 17, 1973, so I will deny the application for costs.

I want to get this document out to you so you can get it typed and get it back to me this afternoon so I can approve it and get it to the clerk's office and it will be entered tomorrow.

MR. ROY: I will do that.

MR. KANZER: I do have one last point, not in relation to the judgment.

As your Honor knows, the judgment that is being entered is a substantial one in terms of the size of my clients. They have every intention, as I earlier advised the court, of taking an appeal and posting the necessary bond. Therefore, everyone will be fully protected.

What I am going to suggest, your Honor,

is there may be problems if there is undue publicity about this matter. Obviously it is a public document. Anybody who wants to go to the record can do so. What I am suggesting is that it would hurt the client financially pending the disposition of the appeal if the parties were or their attorneys were to go to the newspapers or other media and to seek publicity as to this, and I would request, if not an order of the court, at least a statement on the record by the court that such conduct should not be engaged in.

THE COURT: I don't recall any press releases by any of the defendants on any stage.

MR. KANZER: We do not know whether they were quotes from the defendants. We do know there were a number of statements in the press that, given the context, would indeed suggest they had emanated from the defendants.

THE COURT: I am just not aware of that.

What would you say, Mr. Roy?

MR. ROY: Your Honor, the judgment is a matter of public record. I am aware that there have been in one or two of the New York papers stores with respect to it, but I believe there were reporters in court at various stages.

I am also recently aware of what -- based on evidence no different than Mr. Kanzer is stating -- a press release from Mr. Levy to Variety -- makes it sound as if this entire lawsuit had been recovered with Mr. Levy recovering $7000 from Mr. Lennon. To the extent this matter is a public matter, this trial has been a public matter, and to the extent there has been a great deal of embarrassment caused Mr. Lennon as a result of this lawsuit and all the rest, I would strongly urge that any order restricting anyone's right within the bounds of the law to discuss this matter with whomever they please not be entered.

MR. KANZER: Your Honor, first I would like to state for the record, since an allegation has just been made against my clients, that to my knowledge no such article emanated from my clients. My clients have been under strict orders from the very commencement of this litigation that any time anyone from the press approaches them in terms of anything in this case, to respond that they would give no comment and that if anyone wanted to speak, they should speak directly to Mr. Schurtman or myself, and both he and I have consistently refused to give any comments to any member of the media.

THE COURT: I see no need for me to impose any order of confidentiality about this judgment. I have no idea what has or has not appeared in the press thus far. It seems to me up to the judgment of the parties and their attorneys as to what they wish to do as far as the press. For me to issue some bar as far as the judgment when I have never heretofore issued any bar whatsoever it seems to me would be inappropriate.

It may be that somebody needs to use this to clarify something. I don't know. Everybody here has virtually the status of a public figure. I am using that in the technical sense of the libel law. Everybody has public prominence. They have public relations problems.

So I think you have to be guided by what each person thinks should be done. I couldn't possibly enter some kind of an instruction at this late date and I will not do so.

We have to conclude this.

MR. ROY: Your Honor, please, if I may, so it is clear, in line with the point made by Mr. Kanzer, to the extent it is not otherwise clear on the record I would like it clear that we have an objec-

tion to the dates chosen for the award of interest and we believe it should be the earlier dates originally contained in our proposed judgment.

THE COURT: You must get the judgment back to me. You must also come back and get the exhibits and the exhibits have been gone over and used and reused. So I think I am going to expect the attorneys to assist Mrs. Jackson in making sure the exhibits are complete and in order and removed from my office.

MR. ROY: Can that be attended to next week.

THE COURT: You can do it next week but you give her a hand on it.

MR. ROY: Would it also be permissible, to save time, my office will rejoin the judgment, if I can be spared the burden of having one person go and get copies received, what I propose doing this f afternoon is have two or three messengers from my office, one to bring it to your chambers, the other go directly to Mr. Kanzer's attorneys.

THE COURT: It is a matter of retyping. I will accept it without proof of service. You arrange to have it cleared among yourselves.

It is just a matter of accurate typing.

MR. ROY: Thank you.

(Case closed.)

I (We) hereby certify that the foregoing is a true and accurate transcript to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

George Wall

Official Court Reporter

Duplicate

BBjw

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
NOV 15 1976
S.D. OF N.Y.

BIG SEVEN MUSIC CORP. and ADAM VIII LTD.,

Plaintiffs,

v. 75-1166

JOHN LENNON, et al.,

Defendants.

September 23, 1976
2:30 P.M.

B E F O R E :

HON. THOMAS P. GRIESA,

District Judge.

A P P E A R A N C E S :

ALAN KANZER, ESQ.,
Attorney for the Plaintiff

JAMES M. BERGEN, ESQ.,
Attorney for the Defendants

THE COURT: So the record is intelligent, let's have the application stated.

MR. BERGEN: The application, your Honor, is for leave to file a cross-notice of appeal. The time to file a cross notice of appeal expired yesterday. We are appealing filing the cross-notice of appeal from so much of the judgment entered in this case as awarded Big Seven, $6,795.

Big Seven is appealing that itself, so I gather what they are seeking leave to do is try to increase the amount, and we are going to argue that it should be lessened.

The grounds are the first, it is not in my affidavit, but I'd like to put it on the record since we do have a reporter.

A supersedeas bond was filed in this case on September either 2nd or 3rd so that the Big Seven has been on notice since then that Mr.Lennon intended to appeal.

THE COURT: In other words, a supersedeas bond was filed by Mr. Lennon?

MR. BERGEN: Yes. By a bonding company in his behalf, and it covers the amount, the $6,795 plus interest and the regular bond.

I submit that that bond, although I do not have

a copy of it with me here, really says everything that a notice of appeal would say.

It says we are appealing, what we are appealing from, gives notice of everything.

Now, my grounds for asking for a leave to file the notice of appeal one day late is that on Tuesday and Wednesday of this week, September 21st and 22nd, I was in Nashville preparing for a trial in the chancery court there which is going to begin next Monday.

In a telephone call I received when I was in Nashville, I was advised that Mr. Lennon wanted to file a notice of appeal. This was a telephone call from the client.

THE COURT: When was this?

MR. BERGEN: This was on Tuesday afternoon.

THE COURT: The final decision had not been taken before that?

MR. BERGEN: Well, we filed the bond, and we were told by the client to file the bond, to protect at least the right to file the notice of appeal, and I was told on Tuesday to go ahead and file the notice because I had written a letter to the client advising the client that they had until the 22nd, so I got this call one day before.

In my absence from the office I neglected to call somebody, specifically Howard Roy, who is the associate that worked on the case with me, to tell him to draft the cross-notice of appeal and to file it.

I don't believe that Big Seven will be prejudiced if we get a one day extension and file the notice of appeal today. They are already appealing the very question that we are appealing. This is unlike any other case where we are filing --

THE COURT: I don't think we should have to spend a lot of time.

What is the problem, Mr. Kanzer?

MR. KANZER: Well, your Honor, two points.

First, as a matter of law, Rule 4A I guess it is, of the Federal Rules of Appellate Procedure.

THE COURT: Do we have the book on that?

MR. KANZER: I have a copy if your Honor would like.

Provides that the only ground for permitting late filing for notice of appeal --

THE COURT: Rule 4 what?

MR.KANZER: It is 4. I think it's A.

MR. BERGEN: The last paragraph of 4A, your Honor.

MR. KANZER: -- says that the only grounds for granting such a request is where there is excusable neglect.

Now, that language, while not entirely clear, is not without construction.

Professor Moore has explained in his treatis that originally before 1966 the only ground for allowing a late filing was where there had been a failure on the part of the late party to receive notice of entry of judgment.

Subsequently in 1966 that was amended to -- you have the present language.

However, the Advisory Committee report stated that such an amendment, such a motion, should only be granted where there were extraordinary and unique circumstances.

THE COURT: Are we talking about the rule prior to the new language?

MR. KANZER: Yes, and it says when that new language --

THE COURT: Have you got a case?

MR. KANZER: Three of them, your Honor.

THE COURT: Have you got cases dealing with a one day delay? I am aware that there are certain statutes

and rules which are absolutely ironclad. This is not one of them, and it does seem to me that one of the circumstances to be taken into account in this non-ironclad statute is the length of the delay. The delay is one day. I take it you can file your notice today.

MR. BERGEN: I've got it with me, your Honor.

THE COURT: All right.

Now, what kind of neglect is there which deals you know -- would foreclose the filing or excusing of a late filing by one day?

MR.KANZER: Your Honor, if I may respectfully suggest, I think you are looking at it in the reverse way. The burden is not on us to show it is not excusable neglect. It is on them to show it.

THE COURT: You are objecting to something which is really --

MR. KANZER: Professor Moore states unequivocall and this is at Paragraph 204.13(1) of Volume 9 of Moore's on Federal Practice. I cannot tell from this copy the exact page.

"Predictably it has been held that the heavy work load of counsel that caused him to overlook the time for appeal does not constitute excusable neglect."

Professor Moore cites several cases in support

of this.

To be frank, your Honor, I did not learn until a quarter of twelve this morning of this motion. Consequentl I have not had much time to research beyond what Professor Moore says.

However, I can refer the Court to at least three cases that seem to be directly on the point.

THE COURT: Mr. Kanzer, any lawyer who came in to me, and it would apply to you or Mr. Schurtman or anybody else, and came to me and said, "I neglected to file. I have delayed by one day. Will you excuse it?", I would excuse it unless the statute was absolutely ironclad.

I think you may be in the same bind someday, and you want the same treatment.

It is the way -- when I was with a law firm we consented to things like that in order for a fellow lawyer not to be embarrassed when there was no prejudice to us, and as a Judge I will do the same thing, and I don't want to hear another word about it, and I am granting the motion. File your notice.

MR. KANZER: Would your Honor like the cases?

THE COURT: No, I would not.

MR. KANZER: Fine.

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United States Court of Appeals
For the Second Circuit

Big Seven Music Corp. and Adam VIII, LTD.,
Plaintiffs-Appellants,

against

John Lennon, Apple Records, Inc., Harold Seider,
Capitol Records, Inc. and EMI Records Limited,
Defendants-Appellees,

and

Morris Levy,
Additional Defendant on Counterclaim-Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:
Jerry N. Simmons
, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 25 Elliott Place Bronx, N.Y. 10452
That on Nov. 19, 1976 , he served

One Appendix Volume 1-6 and one Exhibit Volume and two Briefs on behalf of Plaintiffs-Appellants and Additional Defendant on Counterclaim-Appellant.

On:
Marshall Bratter Greene Allison & Tucker, Esqs.
430 Park Avenue
New York, N.Y. 10022

Cleary, Gottlieb, Steen & Hamilton, Esqs.
One State Street Plaza
New York, N.Y. 10004

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

.....

Sworn to before me this
19 day of November , 1976

JOHN [illegible]
Notary Public, State of New York
Qualified in [illegible] County
Commission Expires [illegible], 19 77